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IN THE

Supreme Court of the United States

October Term, 1948.

No. 824 84

AERO SERVICES, INC., a corporation, debtor,

Petitioner,

vs.

JOHN R. QUINN, County Assessor, and H. L. BYRAM, County Tax Collector, of Los Angeles County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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JOHN R. QUINN, County Assessor, and H. L. BYRAM, County Tax Collector, of Los Angeles County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Aero Services, Inc., a corporation, debtor under an arrangement pursuant to §322 of Chapter XI of the Bankruptcy Act, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Ninth Circuit which was entered by that Court on January 24, 1949, and was followed by a denial by that Court of the debtor's petition for rehearing on March 14, 1949. The judgment of the Court of Appeals which reversed the judgment of the Bankruptcy Court (both that of the Referee in Bank-

ruptcy and the United States District Court) was to the effect that the Bankruptcy Court had no jurisdiction to determine the amount due the County Tax Collector of Los Angeles County for personal property taxes assessed against the debtor where there had been no determination by the state taxing authorities of the amount of tax due until several weeks after the commencement of the bankruptcy proceedings, and where the taxes did not become payable until several months after the commencement of the bankruptcy proceedings; the tax bill covering the taxes in question was not submitted to the debtor until after the assessment had become final under state law and beyond review or appeal in any state tribunal.

Opinion Below.

The opinion of the Court of Appeals is reported at 172 F. 2d 157, and is also included in the record before this Court at page 102 thereof. The opinion of the District Court is reported at 75 Fed. Supp. 347, *sub nom. In re Aero Services*, and is also included in the record before this Court at page 62 thereof.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was filed on January 24, 1949. Thereafter on February 23, 1949, your petitioner herein petitioned the Court of Appeals for rehearing. The petition for rehearing was denied on March 14, 1949. The jurisdiction of this Court is invoked under Title 28, U. S. C., §1254, as amended by the Act of June 25, 1948 (Public Law 773—80th Congress; Chapter 646—2nd Session); and under §24(c) of the Bankruptcy Act, 11 U. S. C. §47(c).

Question Presented.

Does the Bankruptcy Court have jurisdiction to determine the amount of taxes due to a state taxing unit (County of Los Angeles) for the payment of personal property taxes where the amount of such taxes had not been determined prior to the commencement of the bankruptcy proceedings and where the procedure provided by state law for the quasi-judicial determination of such taxes was not available until after the commencement of the bankruptcy proceedings?

Statutes Involved.

1. Section 64, Subdivision (a)(4) of the Bankruptcy Act, as amended (United States Code, Title 11, Chap. 7, Sec. 104), reading as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any state or any subdivision thereof: *Provided*, That no order shall be made for the payment of a tax assessed against any property of a bankrupt, in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court . . ."

2. Section 302 of the Bankruptcy Act, as amended (United States Code, Title 11, Chap. 11, Sec. 702), reading as follows:

> "The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent

with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to debtors', and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered."

3. Section 312, Subdivision (2) of the Bankruptcy Act (United States Code, Title 11, Chap. 11, Sec. 712), reading as follows:

"Where not inconsistent with the provisions of this chapter [Chapter XI], the jurisdiction, powers, and duties of the court shall be the same—

"(2) Where a petition is filed under Section 322 of this Act, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed."

4. The following sections of the California Revenue and Taxation Code setting forth the tax determination and adjustment procedure are indirectly involved:

405, 441, 454, 616, 617, 1601, 1603, 1605, 1607, 1608, 1609, 1610, 1614, 2189 and 2192.

The provisions of the foregoing sections of the Revenue and Taxation Code of the State of California are set forth in their entirety in the Appendix, *infra*.

Statement.

The facts in the case at bar appear to be undisputed. Aero Services, Inc., the debtor herein (hereinafter referred to as "Aero"), owned the taxed personalty and also certain real property situated in the County of Los Angeles on March 4, 1946, the first Monday of March, 1946 [R. 21], which is the tax and lien date in California (California Revenue and Taxation Code, §§405, 2192, 117, 2189). On May 14, 1946, a verified declaration of the property, made on behalf of Aero by its auditor, was filed with the County Assessor [R. 39]. This declaration showed the taxable value of the aforesaid personalty on March 4, 1946, to have been $355,710.00 [R. 39].

On June 3, 1946, Aero initiated bankruptcy proceedings by filing its petition under Section 322 under Chapter XI of the Bankruptcy Act [R. 2-13]. Thereafter, on or at some time prior to the first Monday of July, 1946, the County Assessor proposed to assess the personalty for county tax purposes at the figure named in the declaration [R. 16, California Revenue and Taxation Code, §616]. No formal notice thereof was given to Aero or to any officer of the Bankruptcy Court, nor was any hearing held. On July 1, 1946, the County Board of Equalization commenced its review of all assessments within the County for the purpose of correcting any errors of the County Assessor and for the further purpose of equalizing the assessments [R. 40, California Revenue and Taxation Code, §§1603, 1605]. The reorganization proceedings having just commenced, neither Aero nor any one on its behalf filed an application with or appeared at the pub-

lic hearings before the Board to secure a reduction in its personalty assessments, as it was entitled to do under the state law [R. 40, California Revenue and Taxation Code, §§1607, 1608]. Under the law of the State of California, the assessment at the aforesaid figure became final on or about July 15, 1946 (California Revenue and Taxation Code, §1614). Thereafter, on or before November 1, 1946, a tax bill based upon the aforesaid assessment was submitted to Aero [R. 40].

On November 1, 1946, the tax upon this personalty became due and on December 5, 1946, it became delinquent under state law [R. 40, California Revenue and Taxation Code, §§2605, 2617]. On December 6, 1946, a petition was filed with the Bankruptcy Court for an order directing the county tax officers to appear and show cause why the Bankruptcy Court should not determine the value of the debtor's personalty for county tax purposes [R. 20-22]. The allegations in the petition were that the property was assessed at $355,710.00 when in fact the debtor did not own or have control of property of the assessed value of any sum in excess of $148,880.00 on the tax date. The order to show cause was issued [R. 17]. The county tax officers answered and objected to the jurisdiction of the Bankruptcy Court to make such a determination [R. 23-35]. After a hearing on the jurisdictional objections, the Referee overruled the objections [R. 42-45], and upon review, the District Court affirmed the order of the Referee [R. 61-79 and 91-92]. The county tax officers took an appeal to the Court of Appeals for the Ninth Circuit which reversed the District Court. The petitioner now seeks a review by certiorari of the judgment of the Court of Appeals for the Ninth Circuit.

Reasons for Granting the Writ.

1. The question presented by this case is of such far-reaching importance in the administration of estates by courts of bankruptcy throughout the nation, that an authoritative determination by this Court is necessary.[1]

There has been confusion amongst the various Courts of Appeals as to the scope and interpretation of this Court's opinions in *Anderson v. State of New Jersey* (1906), 203 U. S. 483;[2] *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132;[3] and *Gardner v. New Jersey* (1947), 329 U. S. 565.[4]

The Court of Appeals for the Ninth Circuit took an erroneous and unreasonably narrow view of these cases in the instant case [R. 102]; under such an interpretation of the law, the Bankruptcy Court would have no jurisdiction

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[1]A thorough and comprehensive comment on and analysis of the problem and particularly the case of *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132, is contained in 55 Harvard Law Review, 1343; see also Wurzel, "Taxation During Bankruptcy Liquidation," 55 Harvard Law Review, 1141, particularly at pages 1147 and 1173.

[2]Holding that a bankruptcy court had jurisdiction to determine the amount of taxes due to a state, including a review of an assessment made by duly authorized state agencies.

[3]Holding that a bankruptcy court had no jurisdiction to review an assessment made by the proper state agencies where the trustee in bankruptcy had participated in the state administrative proceedings for the determination of the tax assessment; the Court distinguished the *Anderson* case on the ground that the assessment procedure involved in that case had been merely ministerial, whereas the *Arkansas* proceedings had been judicial in nature.

[4]Holding that the Bankruptcy Court had jurisdiction, subject to the rule of the *Arkansas* case, to determine the amount of state tax claims and to supervise compromises thereof.

whatsoever in any matters with respect to any questions involving the amount of any state tax claim. A similar position was taken by the Court of Appeals for the Tenth Circuit in *In re Ingersoll Co.* (1945), 148 F. 2d 282. On the other hand, the Second and Third Circuits have held that whether or not a bankruptcy court may inquire into state tax assessments depends upon the circumstances of the particular case. *Lyford v. City of New York* (2nd Cir., 1943), 137 F. 2d 782; *In re Monongahela Rye Liquors, Inc.* (3rd Cir., 1944), 141 F. 2d 864. The Court of Appeals for the Eighth Circuit takes still another view of the scope of the bankruptcy court's power. That Court holds that the bankruptcy court has the same power to review an assessment as do the courts of equity of the taxing jurisdiction. *Baumann v. Sheehan* (1944), 140 F. 2d 747.[5]

2. The decision of the Court of Appeals for the Ninth Circuit, holding that the bankruptcy court has no jurisdiction under the circumstances of this case to determine the amount of taxes due by the debtor to a state taxing unit, is in conflict with the applicable decisions of this Court.

There having been no judicial determination of the amount of the taxes due and no opportunity being available to the debtor under state law to have the tax determination made, the bankruptcy court is the only court open to the debtor and his creditors. *Anderson v. State of*

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[5]*Cf. Commonwealth of Pennsylvania v. Aylward* (8th Cir., 1946), 154 F. 2d 714. In this case the tenor of the opinion indicates the same narrow view taken by the court below in the instant case, but on the facts the *Arkansas* rule clearly applied because the bankrupt and the trustee in bankruptcy had participated in the assessment hearings before the state taxing agency.

New Jersey (1906), 203 U. S. 483, *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132, and *Gardner v. New Jersey* (1947), 329 U. S. 565.

3. The decision of the Court of Appeals for the Ninth Circuit holding that the bankruptcy court did not have jurisdiction to determine the amount of taxes due by the debtor to the County of Los Angeles, is directly in conflict with the decision of the United States Court of Appeals for the Third Circuit in In re Monongahela Rye Liquors, Inc. (1944), 141 F. 2d 864, and with the decision of the United States Court of Appeals for the Second Circuit in Lyford v. City of New York (1943), 137 F. 2d 782.

Conclusion.

The mere legal arguments heretofore set forth in support of this petition would, of themselves, justify a consideration by this Honorable Court of the question presented. In addition thereto, however, bankruptcy courts and their officers, almost every day, must face far-reaching practical administrative problems arising in a substantial number of bankruptcy proceedings, the solution of which requires guidance from this Court; this case affords an opportunity for giving such needed guidance.

In every bankruptcy administration, the bankruptcy court has to consider the tax claims filed by federal, state, county, municipal and numerous other subsidiary taxing agencies. These claims having priority over the claims of general unsecured creditors,[6] frequently consume the

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[6]Section 64 of the Bankruptcy Act, 11 U. S. C., Chap. 7, Sec. 104.

entire estate, leaving nothing for the general unsecured creditors. The time elements involved rarely permit a receiver or trustee in bankruptcy an adequate opportunity to present any objection or protest to the administrative or quasi-judicial fora created by particular taxing entities. The Bankruptcy Act itself contains an express recognition by Congress of the necessity for the bankruptcy court's exercising jurisdiction as to the "amount or validity" of tax claims. The scope of that jurisdiction, however, is at present open to some question and confusion. A definitive decision by this Court of the power of bankruptcy courts to deal with tax claims is of compelling necessity, particularly in view of the divergent treatment given the problem by the different circuits.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit which held that the Bankruptcy Court had no power to deal with the problem.

Dated: May 23, 1949.

AERO SERVICES, INC.,
Debtor and Petitioner,

By MARTIN GENDEL,
Counsel for Petitioner.

MARTIN GENDEL,
GEORGE BOUCHARD and
H. MILES RASKOFF,
Of Counsel.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at page 102 of the record before this Court and at 172 F. 2d 157. The opinion of the District Court is reported at page 62 of the record before this Court and at 75 Fed. Supp. 347, *sub nom. In re Aero Services.*

Jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked are stated in the Petition at page 2 thereof.

Statement of the Case.

A statement of facts appears in the Petition at pages 5 and 6 thereof; in the interest of brevity they are not restated. However, a brief summary of the controlling facts in their chronological order facilitates the presentation of the legal question involved.

The judgment of the Court of Appeals was that the Bankruptcy Court had no jurisdiction to determine the amount due from the debtor to the County of Los Angeles for personal property taxes where all of the following circumstances were present:

1. The tax liability accrued and became a lien on the real property of the debtor on the first Monday of March, 1946 (California Revenue and Taxation Code, §§405, 2192, 117, 2189);

2. The debtor initiated bankruptcy proceedings by filing its petition under Section 322 of Chapter XI of the Bankruptcy Act on June 3, 1946 [R. 2];

3. On the same date, to-wit, June 3, 1946, appropriate orders were made permitting the operation of the business of the debtor, under the control of the Bankruptcy Court, allowing the debtor to remain in possession under a plan of arrangement [R. 16];

4. The actual assessment of the personal property was made by the Los Angeles County Assessor some time between May 14, 1946, and the first Monday of July, 1946, without any hearing and without any appearance having been made by or on behalf of the debtor (there being no provision in the laws of the State of California for such hearing or appearance) [R. 27-28; Rev. & Tax. Code, §§405, 616];

5. The first meeting of creditors in the reorganization proceedings was held on July 1, 1946;

6. Under the laws of the State of California, the assessment became final and beyond review in any State board or tribunal upon its approval by the County Board of Equalization on July 15, 1946, without any hearing and without any appearance having been made by or on behalf of the debtor [R. 40];

7. The tax bill was presented to the debtor some time after July 15, 1946, in the latter part of that year [R. 40];

8. Under State law the taxes became due on November 1, 1946 [R. 40; Calif. Rev. & Tax. Code, §2605];

9. Under State law the taxes became delinquent on December 5, 1946 [R. 40; Calif. Rev. & Tax. Code, §2617];

10. On December 6, 1946, the debtor filed with the Bankruptcy Court its petition for an order requiring the taxing officials to show cause why the Bankruptcy Court should not determine the amount of taxes due from the debtor to the taxing unit [R. 20];

11. At the time of the filing of said petition for an order to show cause, the petition under Chapter XI of the Bankruptcy Act was pending, and it is still pending, but no order has thus far been entered confirming the debtor's plan of arrangement with its creditors, primarily because of litigation over these and other tax priorities; the debtor continues in possession of its assets, but all of its business operations have been suspended [R. 16].

Because a determination of the question presented by this petition involves a consideration of the assessment and tax procedure of the State of California, we set forth herein the summary of that procedure contained in the opinion of the Court of Appeals below [R. 108 and 172 F. 2d at 160]:

"Between the first Mondays in the months of March and July the County Assessor is required to ascertain and assess all taxable property within his jurisdiction as of the first Monday in March. (Sec. 405.)[1] Between the first Monday in March and the last Monday in June each taxpayer is required to file with the County Assessor a verified declaration of his taxable property. (Sec. 441.) In addition, the County Assessor is authorized to subpoena and examine any taxpayer with respect to any statement disclosing taxable property. (Sec. 454.) Upon completion of the assessment roll on or before the first Monday in July, by the assessor, he delivers it to the County Board of Equalization. (Secs. 616, 617.) The County Board of Equalization, upon receipt of the roll, gives legal notice by publication of the roll's completion and the time at which the board will meet to equalize assessments. (Sec. 1601.) Taxpayers desiring changes in their assessments must, either in person or by an agent, file verified written applications for such changes, setting forth the supporting facts.

"Applicants may be present at stated hearing and must be examined under oath by the Board concerning the value of their property, if they so desire. (Secs. 1607, 1608.) The Board may, in the course of its hearing of any application, subpoena witnesses and take evidence and the Assessor and his deputies must be present to present evidence as needed. (Secs. 1609, 1610.) The session of the Board commences on the first Monday in July and continues not later than the third Monday in July. (Sec. 1603.) For the purpose of equalizing assessments, the Board may

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[1]All references are to the Revenue and Taxation Code of the State of California.

increase or decrease individual assessments. (Sec. 1605.) Following the close of the Board's session the corrected assessment roll is delivered to the County Auditor for totaling of the valuations thereon. (Secs. 1614, 1646.)"

Specification of Errors.

The Court of Appeals erred:

1. In holding that the bankruptcy court had no jurisdiction to determine the amount of taxes due to the County of Los Angeles, where the amount of such taxes had not been determined by any State officer, board or tribunal prior to the commencement of the bankruptcy proceeding.

2. In holding that the approval of the assessment by the County Board of Equalization subsequent to the commencement of the bankruptcy proceeding afforded a proper basis for a plea of *res judicata* on the question of the amount of taxes due the County of Los Angeles.

3. In applying the rule of *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132, to the facts of this case, in that in the *Arkansas* case all of the taxes had accrued subsequent to the bankruptcy proceedings and the trustee in bankruptcy had in fact participated in the hearings before the State body, which, after the hearings, had judicially determined the amount of taxes; whereas, in the instant case, the taxes had accrued (although their amount was as yet undetermined) prior to the commencement of the bankruptcy proceedings and no officer of the Bankruptcy Court had participated in, or had an opportunity to participate in, any hearings before the state board.

4. In failing to apply the rule of *New Jersey v. Anderson* (1906), 203 U. S. 483.

Summary of Argument.

At the outset, petitioner desires to make it clear that it does not question the ruling of this Court in the case of *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132. In that case, this Court held that a reorganization court had no jurisdiction to determine the assessed value of property for taxes accruing subsequent to the commencement of the reorganization proceeding for a period during which the property was operated by the trustee appointed by the bankruptcy court where the trustee had participated in the hearings before the state board, which, after a full hearing, had fixed the value of the property. Our contention is, however, that the Court of Appeals for the Ninth Circuit erroneously applied the rule of that case to the instant case for the following reasons:

1. The Bankruptcy Act expressly confers jurisdiction on the bankruptcy court to determine the amount of taxes due.

2. There had been no hearing or determination by any state board or tribunal as to the value of the property subject to the tax and there is, therefore, no basis for a plea of *res judicata*.

3. The bankruptcy court may, in its discretion, refer the question of the assessed value of the property to the proper state board or tribunal for its determination, but, as a condition precedent, the jurisdiction of the bankruptcy court must first be invoked in order to have it make such a reference.

4. If the bankruptcy court is without jurisdiction to resolve the question presented by this case, the fraudulent or other wrongful acts of the debtor or the bankrupt would thereby be placed beyond the reach of the bankruptcy court to the detriment of the creditors and in violation of the basic policy and the spirit of the Bankruptcy Act.

ARGUMENT.

I.

The Bankruptcy Act Expressly Confers Jurisdiction on the Bankruptcy Court to Determine the Amount of Taxes Due.

Section 64(a)(4) of the Bankruptcy Act (11 U. S. C. A. 104(a)(4)), in so far as it is here relevant, provides:

> ". . . in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court."

Section 302 of the Act (relating to Chapter XI proceedings) incorporates all the provisions of the Act applicable to actual bankruptcies (Chapters I to VII which includes Section 64) "insofar as they are not inconsistent with or in conflict with the provisions of this Chapter." Section 312 of the Act, also dealing with Chapter XI proceedings, defines the jurisdiction, powers and duties of the court to be the same "as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this Chapter was filed."[2]

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[2]The respondents herein have conceded, as indeed they must, that Section 64(a)(4) of the Bankruptcy Act was applicable to the instant case. (See Appellant's Brief before the Court of Appeals for the Ninth Circuit, pp. 8, 11 and 23.) While this Court, in *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132, and *Gardner v. New Jersey* (1947), 329 U. S. 565, expressly left open the question of whether or not Section 64(a)(4) applied to railroad reorganization proceedings (in the *Arkansas* case on the

The section of the Bankruptcy Act under discussion authorizes the bankruptcy court to determine "any question . . . as to the amount or legality of any taxes." The petition for an order to show cause by which the debtor herein attempted to invoke the jurisdiction of the bankruptcy court was expressly for the purpose of obtaining a determination by that court of "the amount of taxes due the County of Los Angeles" [R. 21]. This Court specifically held in the case of *Anderson v. New Jersey* (1906), 203 U. S. 483, that Section 64 of the Bankruptcy Act as it then existed (containing language almost identical to that contained in Section 64(a)(4) of the present

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ground that regardless of whether or not the section applied, it was not broad enough to include the power there asserted by the trustee in bankruptcy; and in the *New Jersey* case the Court held that it was not necessary to decide the question because even if the section did not apply, Section 77 was deemed broad enough to include power in the bankruptcy court to adjudicate the matters there involved), those cases involved the railroad reorganization sections (Section 77) of the Bankruptcy Act and did not in any way pertain to the above quoted provisions of Chapter XI. A reading of Chapter XI reveals no provision in any way inconsistent with the provisions of Section 64(a)(4). Furthermore, it should be noted in this connection that in Chapter X of the Bankruptcy Act which contains a similar incorporation by reference of the other chapters of the Bankruptcy Act ("in so far as they are not inconsistent or in conflict with the provisions of this Chapter". Sec. 102, 11 U. S. C. §502), Congress deemed it necessary to expressly exclude from Chapter X the provisions of Section 64 of the Act (Sec. 102, *supra*). No such exclusion is contained in Chapter XI. In fact, Chapter XI of the Act would seem to expressly incorporate the provisions of Section 64 by reason of the reference in Section 337(2) (11 U. S. C. §737) to "all debts which have priority" which must be paid or provided for before the plan of arrangement may be confirmed; the only other reference in the entire Chandler Act to "debts which have priority" being contained in Section 64 (11 U. S. C. §104).

Bankruptcy Act)[3] authorized the bankruptcy court to go into the question of the value of the property subject to the tax, notwithstanding the fact that the state administrative agency had, pursuant to state law, made an assessment. The rule of *Anderson v. New Jersey* is now apparently subject to the limitations imposed by this Court in the cases of *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132, and *Gardner v. New Jersey* (1947), 329 U. S. 565, but as we shall hereinafter show, none of those limitations is in any way applicable to the instant case.

In the *Arkansas* case, this Court held that the rule of the *Anderson* case did not apply to a situation where the trustee in bankruptcy had participated in hearings before a state administrative tribunal which had judicially determined the amount of taxes due, distinguishing the *Anderson* case on the ground that in that case the determination was a mere ministerial act of the taxing officials.

The rule announced by the Court below ignores this distinction and apparently holds that the rule of the *Anderson* case was completely superseded by the *Arkansas*

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[3]"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality, in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court." (Sec. 64(a), Act of 1898 (30 Stat. 563, [U. S. Comp. Stat. 1901, p. 3447].)

case, thus nullifying the above quoted statutory provisions. The Court below, merely upon the basis of the pleadings, determined that the bankruptcy court was without jurisdiction to consider the petition requesting the bankruptcy court to determine the amount of taxes due to the County of Los Angeles. No evidence was taken and, under the ruling of the Court, no evidence could have been taken. If the tax has not been determined judicially by the proper state tribunal, the bankruptcy court, under the *Anderson* and *Arkansas* cases, has jurisdiction to determine the amount of the tax, but how can a court decide whether the determination of taxes has been made "ministerially" or "judicially" without taking evidence pertaining to the facts of the determination?

While the meaning of the words "ministerially" and "judicially" as applied to tax determinations is not free from doubt, it would seem clear beyond question that the bankruptcy court must consider the facts of the particular case before it in order to have some basis for deciding whether or not the tax has been judicially determined.[4]

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[4]This basic principal is succinctly stated in *In re Monongahela Rye Liquors, Inc.* (3rd Cir., 1944), 141 F. 2d 864, at 867:

> "Generally speaking, therefore, we think that a bankruptcy court has the power to redetermine tax claims in the exercise of its jurisdiction under the Chandler Act. But we also think that certain factual determinations in respect of such claims, when competently made in another forum, may be conclusive *at a hearing thereon in a bankruptcy court.* Such we believe is indicated by a comparative reading of the decisions in *New Jersey v. Anderson* and *Arkansas Corporation Commission v.*

If the decision below is permitted to stand throughout the territory included in the Ninth Circuit the mere assertion of a property tax claim by a state taxing unit will preclude any inquiry by the bankruptcy court as to the propriety of the claim. Thus, the court below would summarily take away the jurisdiction expressly given by Congress to courts of bankruptcy to determine questions "as to the amount or legality of any taxes." This Court has recently had occasion to point out that such a rule runs counter to the basic policy of the Bankruptcy Act when it stated:

> "If the reorganization court lacked the power to deal with tax liens of a State, the assertion by a State of a lien would pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other State tribunals. That would . . . seriously impair the power of the court to administer the estate. . . ." (*Gardner v. New Jersey* (1947), 329 U. S. at 577.)

Thompson, supra. . . . The question in any instance, therefore, is whether the circumstances necessary to justify an exercise of bankruptcy's power to redetermine a tax claim are present. We think they are in the instant case. The taxpayer having failed to file a return, the tax assessments against it were based upon estimated 'settlements' arbitrarily made by the State's Department of Revenue without hearing the taxpayer." (Emphasis added.)

II.

There Had Been No Hearing or Determination by Any State Board or Tribunal as to the Value of the Property Subject to the Tax and There Is, Therefore, No Basis for a Plea of Res Judicata.

The decision in *Anderson v. New Jersey* (1906), 203 U. S. 483, constituted a specific holding by this Court that under Section 64(a)(4) of the Bankruptcy Act the bankruptcy court had jurisdiction to determine the valuation of property subject to state taxes notwithstanding the fact that state administrative agencies had already made an assessment under a state taxing statute.[5] From the date of the *Anderson* case (1906) to the date of the *Arkansas* case (1941), the bankruptcy courts throughout the United States and the various courts of appeals had

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[5]"Coming to the specific objections to the claim for the year 1902, the claim was presented upon the basis of $40,000,000 of outstanding capital stock, when in fact there was only $10,000,000 of such stock, the assessment by the State board being upon the former sum and made upon the failure of the corporation to report. But we do not think the finding of the State board is conclusive. The tax is to be assessed upon capital actually outstanding. It may well be doubted whether the board had power to tax any other stock. But be that as it may, section 64a specifically provides that in case any question arises as to the amount or legality of taxes, the same shall be heard and determined by the court, with a view to ascertaining the amount really due. We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character, and that the claim should have been upon the basis of the capital stock actually outstanding." *State of New Jersey v. Anderson*, 203 U. S. at 493.

for the most part given a very broad interpretation to the decision.[6]

The *Arkansas* case presented to this Court the question of whether the bankruptcy court had jurisdiction to determine the amount of taxes due the State of Arkansas upon an assessment which the trustee there alleged was excessive. The factual situation was as follows:

> The debtor had been in reorganization since 1933. During the entire period of the reorganization, the properties were being operated by the trustee. The particular tax claim was for taxes for the year 1939. The record showed that the trustee had participated in hearings before the Arkansas Corporation Commission. After those hearings, the Commission ruled adversely to the trustee's contention and the trustee then petitioned the Commission for a rehearing which the Commission considered and denied. Although the trustee had a right to take a review to the Arkansas courts, he did not do so. Instead, after the order of the Commission had become final under Arkansas law and three months after the rendition of the decision, the trustee filed a petition in the bankruptcy court asking it to redetermine the assessed value of the property.

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[6] *In re Gustav Schaefer* (6th Cir., 1939), 103 F. 2d 237, *cert. den. sub nom. Wells v. Boyle*, 308 U. S. 579; *Dickinson v. Riley* (8th Cir., 1936), 86 F. 2d 385; *County of Henderson v. Wilkins* (4th Cir., 1930), 43 F. 2d 670; *In re General Film Corp.* (2nd Cir., 1921), 274 Fed. 903. For a complete discussion of the cases prior to the *Arkansas* case, see 3 Collier on Bankruptcy (14th Ed.), pp. 2144-2162, particularly at p. 2146.

On these facts, the Court ruled that the decision of the Arkansas Corporation Commission was *res judicata,* stating:

> "Nothing in this language [Sec. 64(a)(4) of the Bankruptcy Act] indicates that taxpayers in bankruptcy or reorganization are intended to have the extraordinary privilege of two separate trials, one state and one federal, on an identical issue of controverted fact—the value of the property taxed." (313 U. S. at 142.)

In referring to the decision of *New Jersey v. Anderson, supra,* the Court stated:

> ". . . but in that case the trustee argued in his brief before this court that under controlling New Jersey law 'the assessors acted ministerially, not judicially,' their 'determination was merely computation,' and their action exceeded their statutory authority."[7]

The Courts of Appeals for the Second and Third Circuits have, since the decision of this Court in the *Arkansas* case, had occasion to consider its scope and have interpreted the rule of the case in the light of its facts. Thus in *Lyford v. City of New York* (2nd Cir., 1943), 137 F. 2d 782, the Second Circuit ruled that even though the state law made a provision for a quasi-judicial determination of the assessment the *Arkansas* case did not pre-

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[7]313 U. S. at 143. An examination of the statutes of Arkansas and New Jersey which were in effect at the time of the respective decisions reveals that the two commissions possessed similar characteristics including requirement of an oath, provision for hearing, issuance of subpoenas, examination of witnesses, production of papers, punishment for contempt, and finality of ruling unless appeal was taken within a specified period. Ark. Dig. Stat. (Pope, 1937), §§1930-2128; N. J. Laws 1888, Chap. 208.

clude a bankruptcy court from making a determination of the value of property subject to taxation where, at the time the bankruptcy court is asked to assume jurisdiction of the matter, there had been no final determination by the tribunals provided by state law. In that case, as in our case, the taxes involved had all accrued prior to the commencement of the bankruptcy proceedings. Unlike our case, however, an officer of the bankruptcy court representing the reorganized corporation, had appeared and participated in state hearings, but despite the lapse of a considerable period of time after the conclusion of the hearings, no decision was reached by the tribunal. Under these circumstances, the court felt that it was both necessary and proper for the bankruptcy court to assert its jurisdiction to make the necessary determination; the court ruling that Section 64(a)(4) of the Act gave the bankruptcy court such jurisdiction. After summarizing the facts of the *Arkansas* case, the court states:

> "But these factors are not present in our case. Here there had been no final or conclusive action by the comptroller. Indeed, the very reason for the proceeding is the inaction of the state-taxing authority. The only definite step so far taken has been merely a preliminary one, namely, the *ex parte* determination of the comptroller, which does not differ from the action of the New Jersey assessors in the Anderson case." (137 F. 2d at 786.)

Similarly, in *In re Monongahela Rye Liquors, Inc.* (3rd Cir., 1944), 141 F. 2d 864, the Court of Appeals for the Third Circuit held that under Section 64(a)(4) the bankruptcy court had power to determine the value of property subject to state taxation. In that case, the bankruptcy proceeding commenced as a reorganization

proceeding under Chapter X, but it was followed by an adjudication in bankruptcy. The taxes involved were for four years prior to bankruptcy and one year of bankruptcy. The bankrupt had failed to file a tax return as it was required to do under state law. Whereupon, the state taxing authorities had made their own estimates of the tax as they were permitted to do under state law. As in our case, the trustee there contended that the valuations were based upon an improper and excessive assessment. The court states:

> "Generally speaking, therefore, we think that a bankruptcy court has the power to redetermine tax claims in the exercise of its jurisdiction under the Chandler Act. But we also think that certain factual determinations in respect of such claims, when competently made in another forum, may be conclusive at a hearing thereon in a bankruptcy court. Such we believe is indicated by a comparative reading of the decisions in New Jersey v. Anderson and Arkansas Corporation Commission v. Thompson, *supra.*" (141 F. 2d at 867.)

After stating the foregoing, the court carefully analyzes the facts and the opinions in the *Arkansas* and the *Anderson* cases and concluded its analysis with the following statements:

> "The view we take of the decision in the Thompson case is that where, after a hearing, a quasi-judicial body, thereunto duly empowered, determines the amount of a tax due, with the right on the part of the taxpayer to a judicial review of the determination, all conformable with the requirements of due process, such determination, upon becoming final by operation of law, is conclusive upon a court of bankruptcy save for mathematical error in the computation of the

amount of the tax or legal error in its assessment. . . .

"For the most part, the tax claims in the instant case are based upon such estimated settlements. We think it is plain that the referee's hearing and determination of the amount of tax actually due did not involve a second trial of a controverted fact, such as the exercise of the power entailed in the Thompson case. We are, therefore, of the opinion that, under the circumstances here shown, the rule of the Anderson case is applicable and that the referee's redetermination of the Commonwealth's tax claims was a justifiable exercise of bankruptcy's power." (141 F. 2d at 868.)

These were the two cases principally relied upon by the District Judge in the instant case in holding that the bankruptcy court had jurisdiction under these circumstances to determine the value of the property subject to the taxes in question. The learned Judge, at the conclusion of his opinion, stated:

"In the instant case the time for objection to the assessment before the Board of Equalization had not expired at the time of the within bankruptcy proceeding. There had been no hearing, finding or final order on the tax at the time of bankruptcy and it therefore appears that the determination of the amount of tax may be had in these pending bankruptcy proceedings, and accordingly this court determines that the objection to the jurisdiction should be overruled." [R. 79 and 75 Fed. Supp. 347, 353.]

The Court of Appeals for the Ninth Circuit, however, overlooked the facts of the *Arkansas* case and merely applied an abstract principle of law which it felt was an-

nounced in that case to the effect that wherever a state law provides a means for a judicial or quasi-judicial determination of the tax, the bankruptcy court is without jurisdiction to make any inquiry into the amount of the tax.[8] This confusion among the various Circuits as to the scope and effect of this Court's decision in the *Arkansas* case serves to emphasize the importance of the question here presented and the need for this Court to clarify the law.

Another factor to be considered is the necessity for the establishment of certain principles to guide the lower courts in making their determination as to whether or not a particular state agency or tribunal exercises quasi-judicial functions, or whether the functions are merely ministerial. This distinction would seem to be the key determination in the light of the distinction of the *Anderson* case as made in the *Arkansas* case.

This Court has recently had occasion to comment on the rule of the *Arkansas* case in *Gardner v. New Jersey* (1947), 329 U. S. 565. That case, like our case, involved taxes accruing prior to the commencement of the bankruptcy proceedings. The State of New Jersey filed a claim in the reorganization proceedings for taxes which the state contended were secured by liens, to which claim the trustee objected. The Court of Appeals for the Third Circuit ruled, on the basis of the *Arkansas* case,

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[8]Relying on the opinion of the 10th Circuit in *In re Ingersoll* (1945), 148 F. 2d 282 (which is almost identical to the 9th Circuit's opinion in our case), and also on the following cases decided by the 8th Circuit: *Pennsylvania v. Aylward* (1946), 154 F. 2d 714 (on the facts almost identical to the *Arkansas* case); and *Baumann v. Sheehan* (1944), 140 F. 2d 747 (where the Court found the trustee guilty of laches).

that the bankruptcy court had no jurisdiction to determine the objections to the tax claim made by the trustee, and in reversing the judgment of the Court of Appeals, this Court stated:

> "We held in *Arkansas Corporation Commission v. Thompson, supra,* that the reorganization court lacked the power under §77 to redetermine for state tax purposes the property value of a railroad where that value had already been determined in state proceedings which afforded ample protection to the railroad's rights." (329 U. S. at 578.)

In referring to the New Jersey procedure for the review of assessments, this Court again referred to the *Arkansas* case, stating:

> "By the standards of *Arkansas Corporation Commission v. Thompson, supra,* that procedure is adequate, so that *re*litigation of the question in the reorganization proceeding would not be appropriate." (329 U. S. at 579.) (Emphasis added.)

A review of the record in the instant case compels the conclusion that a determination by the bankruptcy court of the amount of taxes due the County of Los Angeles would not be *re*litigation because the matter had never before been litigated. Here, the assessment was made and the time to object to the assessment all occurred within a few weeks after the filing of the petition under Chapter XI. The first meeting of creditors in the bankruptcy proceedings occurred on July 1, 1946, and thus it is apparent that at the time when the state law required objections to be filed to the proposed assessment, the bankruptcy administration was just getting under way. It is obvious, of course, that during the beginning stages of the bankruptcy administration no officer of the bankruptcy

court is in a position to know the intricacies of the financial affairs of the debtor. For these reasons, for all practical purposes, there was no opportunity for any officer of the bankruptcy court to make any objection to the tax. No objection having been filed, the County Board of Equalization merely *approved* the assessment theretofore made by the County Assessors. To use the language of this Court in *Gardner v. New Jersey,* has the value of the property subject to tax "already been determined in state proceedings which afforded ample protection to the . . . [debtor's] rights?" Would a determination of this question by the bankruptcy court constitute "*re*-litigation"? In view of this Court's distinction between the cases of *Anderson v. New Jersey* and *Arkansas Corporation Commission v. Thompson,* it first becomes necessary to determine whether or not, in the instant case, the County Board of Equalization acted ministerially or judicially. Before the Court of Appeals, the respondents herein contended that the Board of Equalization, in determining the assessed value of property, acts in a judicial capacity.[9] We concede that where the taxpayer has filed

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[9]The respondents herein conceded before the court below (p. 15 of Appellant's Brief before the Court of Appeals for the Ninth Circuit) that the County Assessor did not act judicially by stating: ". . . we do not argue that the County Assessor here acted judicially within the meaning of the *Arkansas* rule. . . ." Their contention was that the approval of the assessment by the County Board of Equalization was "a valid and constitutional quasi-judicial determination," citing *People v. Goldtree* (1872), 44 Cal. 323; *Oakland v. Southern Pacific Co.* (1900), 131 Cal. 226, 230, 63 Pac. 371; and *Los Angeles Etc. Co. v. County of Los Angeles* (1912), 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277. All of these cases involved hearings on objections to proposed assessments; none of these cases dealt with a situation like this case where the taxpayer had failed to file an objection with the board.

an objection to the assessment and there is a hearing thereon, after which the Board of Equalization, upon the evidence presented, makes a determination as to the amount of the assessment, then there is a quasi-judicial determination. We do not concede, however, that this means that the mere approval by the State Board of Equalization of the assessment constitutes a judicial determination, notwithstanding the apparent holding to the contrary by the Court of Appeals which stated in its opinion:

> "We think the procedure just outlined provides for a valid and constitutional determination, quasi-judicial in nature, whether or not the taxpayer petitioned for a redetermination and whether or not he appeared." [R. 109, 172 F. 2d at 171.]

We submit that such a holding is not only contrary to the controlling decisions of this Court, but also is in conflict with the basic spirit and policy of the Bankruptcy Act enacted by the Congress of the United States pursuant to the constitutional delegation of power to the Federal Government to promulgate uniform bankruptcy legislation. Where, as here, bankruptcy intervenes between the proposed assessment and the meeting of the County Board of Equalization, the proper issue is whether any officer of the bankruptcy court was guilty of laches in failing to file any objection with the Board. In this case, the time to file any such objection had long since passed before any officer of the bankruptcy court even learned of the assessment and so there could be no laches.[10]

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[10]The tax bill having been presented after the time to object had passed [R. 40]. *Cf.: Baumann v. Sheehan* (8th Cir., 1944), 140 F. 2d 747, where the trustee in bankruptcy was found guilty of laches.

The Court of Appeals felt that the facts of our case gave the act of the County Board of Equalization in approving the assessment made by the County Assessor a status similar to that of a default judgment. This analogy, however, is not supported by California law. The statutes of the State of California contain a provision whereby a court can, within its sound discretion, grant a party relief from his default in any judicial proceeding.[11] Not so, however, with respect to a "default" in failing to file any objection to an assessment with the County Board of Equalization. There is no way the time can be extended. In fact, in order for the Board to hear any objections to the assessment, a written objection must be filed with the Board during its session. (Revenue and

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[11]Code of Civil Procedure of the State of California, §473: ". . . The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken. . . ." The case of *Nuckolls v. Bank of America* (1937), 10 Cal. 2d 266, contains a comprehensive statement of the Supreme Court of the State of California as to the meaning of this code section. The case is particularly significant here by reason of the fact that the court there granted to a trustee in bankruptcy relief from a judgment taken against the bankrupt by default where he had filed a voluntary petition in bankruptcy after the trial but before the judgment in question was entered and was adjudged a bankrupt after the entry of the judgment. See also *Hammond Lumber Co. v. Gilkey* (1932), 120 Cal. App. 252.

Taxation Code, Sec. 1607.) The session of the Board is fixed by statute to commence on the first Monday in July "until the business of equalization is disposed of, but not later than the third Monday in July."

Nor is there any judicial review permitted of an assessment approved by the Board under the circumstances of this case. *Luce v. City of San Diego* (1926), 198 Cal. 405, 245 Pac. 196; *Dawson v. County of Los Angeles* (1940), 15 Cal. 2d 77.[12] By reason of the fact that no other remedy is available, the bankruptcy court should have the power to correct excessive tax claims in order to assure equitable distribution of the bankrupt's estate to its prior creditors, including state and federal tax claimants, and to its general trade creditors.

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[12]These cases, which were relied upon by the respondents in the court below (see Appellant's Brief before the Court of Appeals for the Ninth Circuit, p. 18), hold that a failure to file a timely objection with the Board of Equalization precludes judicial review of the assessment on the theory of failure to exhaust administrative remedies. The cases in no way even suggest that the Board has acted in a judicial capacity where no objection has been filed.

III.

The Bankruptcy Court May, in Its Discretion, Refer the Question of the Assessed Value of the Property to the Proper State Board or Tribunal for Its Determination, but, as a Condition Precedent, the Jurisdiction of the Bankruptcy Court Must First Be Invoked in Order to Have It Make Such a Reference.

We contend that application of the foregoing authorities to the facts of this case compels the conclusion that the bankruptcy court had jurisdiction to determine the amount of taxes due, and that the Court of Appeals erred in holding there was no such jurisdiction. We are also aware of the basic policy considerations which come into play in making a ruling as to the extent of the bankruptcy court's jurisdiction with respect to tax matters. There is first of all the pure bankruptcy policy favoring orderly, expeditious and equitable administration and distribution of the assets of the bankrupt's estate. Secondly, there is the distinct (and apparently conflicting) policy against federal interference with state taxation. Finally, with respect to the weight to be given to the findings and rulings of administrative tribunals, there is the policy that the determinations of such boards shall not be the subject of extensive judicial litigation until the administrative remedies have been exhausted.

In a case presenting a related problem, this Court has suggested a method whereby all three of these policies can be given full effect. In *Thompson v. Magnolia Co.* (1940), 309 U. S. 478, the question presented to this Court for decision was whether or not the bankruptcy court had summary jurisdiction to adjudicate property

rights as between a railroad in reorganization and third parties who claimed adversely to the railroad. The particular controversy concerned the right to drill for and capture fugitive oil under the railroad right of way. The Court held that the bankruptcy court had summary jurisdiction to determine the controversy by reason of the fact that the right of way was in the possession of the railroad at the commencement of the reorganization proceedings. However, by reason of the fact that a determination of the controversy involved questions of state law which had not been finally determined by the courts of the state in question, this Court referred the issue to the state courts.[18] Thus the Court demonstrated that the ". . . malleable processes of courts in bankruptcy give assurance of a

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[18]"A court of bankruptcy has an exclusive and non-delegable control over the administration of an estate in its possession. But the proper exercise of that control may, where the interests of the estate and the parties will best be served, lead the bankruptcy court to consent to submission to state courts of particular controversies involving unsettled questions of state property law and arising in the course of bankruptcy administration. And, under the cricumstances of this case, we conclude that it is desirable to have the litigation proceed in the state courts of Illinois. An order to the trustee to proceed in the Illinois courts for a decision on the ownership of the fee to the right of way lands will be comparable to one in which the bankruptcy court, preserving the status quo the while, orders a trustee to determine in a plenary state court suit the legal right to property alleged by the trustee to have been fraudulently transferred by the bankrupt. Decision with which the federal court of bankruptcy is here faced calls for interpretation of instruments of conveyance in accordance with Illinois law. Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable. And the difficulties of determining just what should be the decision under the law of that state are persuasively indicated by the different results reached by the two Circuit Courts of Appeal that have attempted the determination. Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the state which in such matters is supreme." (309 U. S. at 483.)

remedy that can be moulded and adjusted to the needs of the occasion." *Steelman v. All Continent Co.* (1937), 301 U. S. 278, at p. 290. The method devised by the Court in the *Magnolia* case harmonized the apparently inconsistent policy of giving the bankruptcy court full jurisdiction with that of giving full deference to the laws of the state creating the legal rights sought to be enforced. Such a solution might be applicable to our case.

Thus the bankruptcy court, in exercising its jurisdiction to determine the proper value of the property subject to the taxes in question, could order the debtor to file an objection with the County Board of Equalization and to have the matter heard and determined by that Board. The jurisdiction of the bankruptcy court must first be invoked in order to make use of this suggested procedure because under the law of the State of California no state court is open for a determination of this controversy; the California cases are clear that unless the remedies provided by state law (the filing of an objection with the County Board of Equalization during the first two weeks in July) are first exhausted, no state court may review any tax assessment.[14]

Nor could any contention be made that this would be impossible on the ground that under the laws of the State of California the Board of Equalization originally

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[14]The California authorities on this point are discussed in footnote 12, *supra*, and in the text in connection therewith.

sat to consider objections to taxes for the period here involved between the first Monday in July, 1946, and July 15, 1946, and that time having long since passed, it would be impossible to carry out the suggested procedure. The California Supreme Court had occasion to pass on just such a contention in the case of *Universal Consolidated Oil Co. v. Byram* (1944), 25 Cal. 2d 353, 153 P. 2d 746. In that case the Court determined that the County Board of Equalization had erred in ruling on a taxpayer's objection to an assessment. At the time the Supreme Court decided the case the period during which the County Board of Equalization sat to hear objections to the taxes there in question had long since expired. The Court felt, however, that it was necessary and advisable that the question of the proper amount of the assessment be decided by the Board of Equalization and not by a court and stated in this connection:

> "True, life of a Board of Equalization is limited by statute (Rev. & Tax. Code, §1603), but that provision is directory only and does not deflect from the statutory scheme that the authorized tribunal pass upon matters properly within its jurisdiction, though in the *completion* of its work, it must act at a time beyond the prescribed period. . . .
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> "The judgment is reversed with directions to the trial court to remand these matters to the Los Angeles County Board of Equalization for further consideration and action in the courts with due process of law. . . . 'There is nothing particularly unusual or contrary to good practice for the court in

> the exercise of its equity powers to retain jurisdiction of the parties and the subject matter of the action, when the circumstances of the case warrant the same, until the appropriate remedy may be finally accorded by the judgment in the action' . . . . Accordingly, the final disposition of these cases must await the Board ruling on the merits of the plaintiff's claim and the court's disbursement of the fund on deposit herein in conformity with the terms thereof." (25 Cal. 2d at 362.)

This suggested procedure was used by the bankruptcy court and affirmed by the Court of Appeals for the Second Circuit, in *Lyford v. City of New York* (1943), 137 F. 2d 782. In that case, the trustee of a corporation in reorganization disputed a tax claim filed by the City of New York. The city having already made an administrative determination of the amount of taxes due objected to the jurisdiction of the bankruptcy court. The bankruptcy court, however, ruled that it had jurisdiction, but ordered the proper agency of the City of New York to hold hearings in which the trustee could participate and redetermine the tax claim, the original tax claim having been based upon an *ex parte* determination of the City of New York. While hearings were held pursuant to the bankruptcy court's order, the matter stood under submission with the administrative agency which made no determination despite the lapse of more than a year after the date of the hearing. At that point, the trustee petitioned the bankruptcy court to determine the matter and by reason of the administrative agency's delay in deciding the ques-

tion, the bankruptcy court appointed a special master to take evidence to determine the amount of taxes due. In overruling the City's objection to the bankruptcy court's jurisdiction, the bankruptcy court stated,

> "The delay in the ascertainment of liability for the utility tax claim asserted by the City has been unreasonable, and the administration of this estate requires a prompt disposition."

In affirming the bankruptcy court, the Court of Appeals states,

> ". . . if power existed for the order below, we should be loathe to interfere with a matter so largely a question of discretion for the bankruptcy judge; and here there is no reason to conclude that the court was unjustified in holding the long delay of the comptroller in rendering his decision to be unreasonable." (137 F. 2d at 784.)

That case again demonstrates ". . . the malleable processes of courts in bankruptcy" being "moulded and adjusted to the needs of the occasion." The bankruptcy court asserted jurisdiction, but in furtherance of the policy of giving full effect to the state administrative machinery, it ordered the city and the trustee to have the matter disposed of by that tribunal; there having been unreasonable delay in that machinery, the bankruptcy court in furtherance of the basic bankruptcy policy for the prompt administration of the estate proceeded to have the controversy determined by one of its own agents.

IV.

If the Bankruptcy Court Is Without Jurisdiction to Resolve the Question Presented by This Case, the Fraudulent or Other Wrongful Acts of the Debtor or the Bankrupt Would Thereby Be Placed Beyond the Reach of the Bankruptcy Court to the Detriment of the Creditors and in Violation of the Basic Policy and Spirit of the Bankruptcy Act.

In this case, the debtor's petition to the bankruptcy court contained allegations to the effect that the property in question had been assessed in an amount in excess of $355,000 when, in fact, the debtor on the date of the assessment did not own property in excess of $149,000 [R. 21]. In its answer to the petition, the respondents alleged that on May 14, 1946 (approximately two weeks prior to the commencement of the bankruptcy proceedings), the debtor filed a property declaration with the County Assessor, setting forth the value of the property of the debtor, and that the assessment, which was based upon said declaration, was at the same valuation [R. 27].

It is certainly not uncommon for a person in dire financial straits to give false and misleading financial statements for the purpose of concealing his true condition. This problem as it relates to tax claims in bankruptcy proceedings has been very comprehensively analyzed in a note on this general subject in 55 Harvard Law Review, 1343 at page 1347:

> "The cases amply demonstrate that grossly excessive tax claims are frequently the result of the bankrupt's having designedly secured an excessive valuation of his property, or having reported large but non-existent incomes in an effort to bolster or main-

tain his failing credit.[15] In such an event, resort to remedies—administrative or judicial—before they are barred is exceedingly unlikely since this would be contrary to the debtor's purpose; and, indeed, even in the absence of design, diligent review of improper taxes by a person in dire financial straits, facing bankruptcy and the loss of all of his property, can scarcely be expected.[16] It is, therefore, hardly an equitable distribution of the bankrupt's assets for the state to be paid an erroneous tax claim merely because it is concluded under the state law. . . ."

This Court has given full recognition to the fact that a court of bankruptcy is essentially a court of equity and in ruling upon claims asserted against the bankrupt, it has the power and duty to entertain objections to claims to prevent the consummation of a fraud upon the creditors of the bankrupt. In *Pepper v. Litton* (1939), 308 U. S. 295, the question presented was the jurisdiction of the bankruptcy court to disallow a claim asserted by the dominant and controlling stockholder of the bankrupt corporation, which claim had been reduced to judgment in a state court proceeding prior to the commencement of the bankruptcy proceeding. In reversing the Court of Appeals and affirming the bankruptcy court which had found that the judgment was obtained by fraud to which the

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[15]Citing *"Camacho v. International Express & Foundry Co.*, 48 Am. B. R. 317 (D. P. R. 1922); *Matter of Suarez & Co.*, 48 Am. B. R. 316 (D. P. R. 1922); *In re E. C. Fisher Corp.*, 229 Fed. 316 (D. Mass. 1915); *Matter of Seaver-Howland Press, Inc.*, 16 Am. B. R. (N. S.) 227 (Ref. D. Mass. 1930.)"

[16]Citing *"Matter of Quinones*, 39 Am. B. R. 320, 324 (D. P. R. 1917); *In re Otto Freund Arnold Yeast Co.*, 178 Fed. 305, 306 (E. D. N. Y. 1910); *Matter of Seaver-Howland Press, Inc.*, 16 Am. B. R. (N. S.) 227, 232 (Ref. D. Mass. 1930)."

bankrupt corporation had been a party and had therefore disallowed the claim, this Court stated:

> "Hence, this Court has held that a bankruptcy court has full power to inquire into the validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence. *Lesser v. Gray,* 236 U. S. 70. And the mere fact that a claim has been reduced to judgment does not prevent such an inquiry. As the merger of a claim into a judgment does not change its nature so far as provability is concerned, *Boynton v. Ball,* 121 U. S. 457, so the court may look behind the judgment to determine the essential nature of the liability for purposes of proof and allowance. *Wetmore v. Markoe,* 196 U. S. 68. It may ascertain the validity of liens, marshal them, and control their enforcement and liquidation. *Isaacs v. Hobbs Tie & Timber Co.,* 282 U. S. 734. And the bankruptcy trustee may collaterally attack a judgment offered as a claim against the estate for the purpose of showing that it was obtained by collusion of the parties or is founded upon no real debt." (308 U. S. at 304.)

Thus, in the light of the rule in *Pepper v. Litton,* the ruling of the court below would give the mere *ex parte,* automatic, ministerial approval by the County Board of Equalization of the assessment made by the County Assessor a higher status in bankruptcy than a final judgment of a state court having full judicial power.

In this case, accepting as true the allegations of the petition as well as the answer thereto, which were the only matters before the Court, it appears that the assessment was based upon a declaration filed by the debtor approximately two weeks prior to the commencement of the bank-

ruptcy proceedings, that the debtor did not own property anywhere near the value of the assessment, and that the time during which an objection could have been made to the Board of Equalization expired within a few days after the first meeting of creditors in the bankruptcy proceedings. Thus it is obvious that there was no opportunity available to make any objection to the assessment and, as hereinabove shown, there was no remedy available under State law. Under these circumstances, the holding of the Court of Appeals that there is no jurisdiction in the bankruptcy court to hear and determine the matter will result in depriving the creditors of the debtor herein of the funds which legally and equitably should be distributed to them by the bankruptcy court by reason of the fraudulent and misleading financial information given by the debtor and thus unjustly enrich the State at the expense of the innocent creditors.

Conclusion.

The opinion of the Court of Appeals for the Ninth Circuit is contrary to law and, unless reversed, will hamper the orderly and proper administration of bankruptcy proceedings. There exists an urgent need for this Court to consider the problems raised by the instant petition because of the varying views taken by the various circuits that have had occasion to consider the problem. One commentator has aptly said,

> ". . . whatever cogency the arguments against federal court interference in local matters and against extensive judicial review of taxes may have when the contest is between the taxpayer and the state, their efficacy wanes when bankruptcy transmutes the issue into a question of the relative rights of the taxing authority and of other creditors in the bankrupt tax-

payer's assets. This question is inextricably a part of the basic bankruptcy issue in the settlement of which the federal and not the state courts were intended by the Constitution to control. Therefore, insofar as the power of the bankruptcy court to determine the amount and legality of a tax is necessary for effective administration, the other considerations should be subordinated. . . . A claim for taxes which has been given no consideration aside from the original assessment, and objections to which can no longer be heard through state remedies, presents the strongest case for the power lodged in the court by the proviso in Section 64(a)(4). State remedies may be unavailable either because of the lapse of time or, with respect to judicial remedies, because of the bankrupt's failure to exhaust administrative remedies. . . . Some review of tax assessments is well-nigh essential in bankruptcy liquidation, and it would be intolerable if the trustees were remitted to a state remedy, only to find this barred in the meantime."[17]

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari be granted and that this Honorable Court review and reverse the judgment of the Court of Appeals for the Ninth Circuit.

Dated: May 23, 1949.

Respectfully submitted,

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Counsel for Petitioner.

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H. MILES RASKOFF,
Of Counsel.

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[17]55 H. L. R. (1942), 1346, 1347.

APPENDIX.

Revenue and Taxation Code of the State of California.

§405. *Time for assessment.* Annually, the assessor shall assess all the taxable property in his county, except State assessed property, to the persons owning, claiming, possessing, or controlling it at 12 o'clock meridian of the first Monday in March. The assessor shall ascertain such property between the first Mondays in March and July. [Enacted 1939; Amended by Stats 1941, ch 1240, §2, p 3111.]

§441. *Written property statement under Oath: Duty and time to file: Furnishing information or, records for examination.* Every person shall file a written property statement, under oath, with the assessor between noon on the first Monday in March and 5 p. m. on the last Monday in May, annually, and within such time as the assessor may appoint. At any time, as required by the assessor for assessment purposes, every person shall furnish information or records for examination. [Amended by Stats 1947, ch 664, §2].

§454. *Same: Examination in respect to statements: Place for appearance.* The assessor may subpena and examine any person in relation to:

(a) any statement furnished him, or

(b) any statement disclosing property assessable in his county that may be stored with, possessed, or controlled by the person.

He may do this in any county where the person may be found, but shall not require the person to appear before

him in any other county than that in which the subpena is served. [Enacted 1939.]

§616. *Affidavit of assessor: Effect of failure to make: Affidavit of deputy.* On or before the first Monday in July, annually, the assessor shall complete the local roll. He shall make and subscribe an affidavit on the roll substantially as follows:

"I, ..., assessor of ..... county, swear that between the first Mondays in March and July, 19...., I have made diligent inquiry and examination to ascertain all the property within the county subject to assessment by me, and that it has been assessed on the roll, according to the best of my judgment, information, and belief, at its value as required by law; and that I have faithfully complied with all the duties imposed on the assessor under the revenue laws; and that I have not imposed any unjust or double assessment through malice, ill will, or otherwise; nor allowed anyone to escape a just and equal assessment through favor, reward, or otherwise."

The failure to make or subscribe this affidavit, or any affidavit, does not affect the validity of the assessment.

The assessor may require from any of his deputies an affidavit on the roll similar to his own. [Enacted 1939.]

§617. *Disposition of roll on completion.* As soon as the assessor completes the local roll, he shall deliver it to the clerk of the board of supervisors, who is ex officio clerk of the county board. [Enacted 1939; Amended by later act passed at same session, Stats 1939, ch 1008, §20, p 2793.]

§1601. *Notice of Equalization meeting: Manner of giving notice.* Immediately on receipt of the local roll from the assessor, the clerk shall give notice of the com-

pletion of the local roll and of the time the county board will meet to equalize assessments by publication in a newspaper, if any is printed in the county, or, if none, as directed by the board of supervisors. [Enacted 1939.]

§1603. *Commencement and duration of session.* Annually, on the first Monday in July, the board of supervisors shall meet as the county board of equalization to equalize the assessment of property on the local roll. It shall continue in session for that purpose, from time to time, until the business of equalization is disposed of, but not later than the third Monday in July. [Enacted 1939; Amended by later act passed at same session, Stats 1939, ch 1008, §22.5, p 2793.]

§1605. *Authority of board: Generally.* After giving notice as prescribed by its rules, the county board may increase or lower any assessment on the local roll in order to equalize the assessment of property on the local roll. [Enacted 1939; Amended by later act passed at same session, Stats 1939, ch 1008, §23.5, p 2793.]

§1607. *Reduction of assessment: Necessity for application: Showing required.* A reduction in an assessment on the local roll shall not be made unless the party affected or his agent makes and files with the county board a verified, written application for it, showing the facts claimed to require the reduction. [Enacted 1939.]

§1608. *Hearing on application: Examination of applicant.* Before the county board makes any reduction, it shall examine, on oath, the person affected or the agent making the application, touching the value of the property. A reduction shall not be made unless the person or agent attends and answers all questions pertinent to the inquiry. [Enacted 1939.]

§1609. *Same: Summoning of witnesses: Evidence.* On the hearing of the application, the county board may subpena witnesses and take evidence in relation to the inquiry. [Enacted 1939.]

§1610. *Presence of assessor and deputies during session.* During the session of the county board, the assessor and any deputy whose testimony is needed shall be present and may make any statement or produce evidence on matters before the county board. [Enacted 1939.]

§1614. *Delivery of corrected roll: Affidavit of clerk.* On the third day after adjournment of the county board, the clerk shall deliver the corrected local roll to the auditor with an affixed affidavit, subscribed by him, as follows:

"I, ..., swear that, as clerk of the board of equalization of ..... county, I have kept correct minutes of all the acts of the board touching alterations in the assessment roll, that all alterations agreed to or directed to be made have been made in the roll, and that no alterations have been made except those authorized." [Enacted 1939.]

§2189. *Tax on personalty as lien on owner's land.* Every tax on personal property is a lien on the real property of the owner thereof. [Enacted 1939.]

§2192. *Time of attachment of liens.* All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied. [Enacted 1939.]

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IN THE

Supreme Court of the United States

October Term, 1949

No. 84.

(Formerly October Term, 1948, No. 821.)

AERO SERVICES, INC., a corporation, debtor,

Petitioner,

vs.

JOHN R. QUINN, County Assessor, and H. L. BYRAM, County Tax Collector, of Los Angeles County,

Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

All of the arguments made by the respondents in their brief were fully answered in the petitioner's opening brief in support of its petition for writ of certiorari. There are, however, certain statements in the respondents' brief which we feel are clearly erroneous.

I.

The Facts of the Case at Bar Are Correctly Stated in the Petition and Brief in Support Thereof.

On page 3 of respondents' brief there is a statement that the facts in the case at bar are erroneously stated in petitioner's petition and brief, but there is no showing wherein our statement is erroneous. Suffice it to say, there is nothing appearing from the statement of facts in respondents' brief any different from or in any way inconsistent with the statement in petitioner's brief. Respondents make reference to a stipulation as to the question presented by this proceeding, but this adds nothing to the statement of facts.

II.

The Question Presented by This Case Is of Far Reaching Importance and There Is a Conflict Amongst the Circuits in Their Treatment of the Question.

Obviously any question as to the nature and extent of the bankruptcy court's jurisdiction over the amount of tax claims is of great importance because of the fact that tax claims are filed in every bankruptcy case. Both the petition and the brief in support thereof demonstrate the importance of this question and the various treatment given the question by the different Circuits.

As further evidence of the significance of this problem and the conflict amongst the Circuits, we respectfully direct this Court's attention to the very recent decision of the Court of Appeals for the Seventh Circuit in *In re Chicago Railways Co.* (decided June 16, 1949), C. C. H.

Bankruptcy Law Reports, page 59,748, Paragraph 56,458, which came down after the filing of our petition and brief. In that case the Court affirmed the ruling of the bankruptcy court that it had jurisdiction to review the assessed valuation of property for the purpose of ruling on the bankruptcy trustee's objections to a property tax claim which was based upon the challenged assessment; the trustee alleged and proved that the assessment was "so grossly arbitrary and unfair as to be fraudulent, illegal and void."

In its opinion the Court of Appeals for the Seventh Circuit defined the scope of the bankruptcy court's jurisdiction as follows:

> "We think it beyond question that the District Court, upon the issues presented, had precisely the same jurisdiction that a court of equity in the state of Illinois would have had, had bankruptcy not intervened."
>
> * * * * * * * *
>
> "Consequently we conclude that under the law of the state of Illinois, a court of equity has the right to interfere in cases such as that presented here; that there can be no question that the court of bankruptcy, sitting as a court of equity, has the same authority and that the facts fully justify its order."

It is apparent from the above quotations that the Seventh Circuit follows the same rule as that announced by the Eighth Circuit in *Baumann v. Sheehan* (1944), 140 F. 2d

747.[1] Thus, analysis of the decisions of the various courts of appeals shows that there are the following three separate and conflicting definitions of the bankruptcy court's jurisdiction over questions pertaining to the amount of a tax claim:

(1) The jurisdiction of the bankruptcy court is coextensive with the jurisdiction of the courts of equity of the taxing jurisdiction.[2]

(2) The bankruptcy court has such jurisdiction as the circumstances of the particular case may require.[3]

(3) The bankruptcy court has no jurisdiction whatsoever with respect to any questions involving the amount of any state tax claim.[4]

The need for this Court's review and clarification of this problem is, therefore, compelling.

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[1]This case is discussed on page 8 of the Petition for Writ of Certiorari filed in the instant case.

[2]*In re Chicago Railways Co.* (7th Cir., June 1949), C. C. H. Bankruptcy Law Reports, page 59,748, Paragraph 56,458.

Baumann v. Sheehan (8th Cir., 1944), 140 F. 2d 747.

[3]*Lyford v. City of New York* (2nd Cir., 1943), 137 F. 2d 782. *In re Monongahela Rye Liquors* (3rd Cir., 1944), 141 F. 2d 864.

[4]*In re Ingersoll Co.* (10th Cir., 1945), 148 F. 2d 282.

Quinn v. Aero Services (9th Cir., 1949), 172 F. 2d 157 (which is the instant case and on which a writ of certiorari is sought).

III.

The Sole Issue Before the Bankruptcy Court Was the Amount of the Tax.

Throughout respondents' brief some point is attempted to be made of the fact that there was no issue as to the calculation of the tax claimed to be due by the County of Los Angeles. Apparently respondents contend that this means there is no controversy. However, the question from the inception of this proceeding before the Referee and on review before the District Court and on appeal before the Court of Appeals has always been the amount of the tax claimed. The contention of your petitioner has been that the amount is erroneous by reason of the fact that it is based upon an improper valuation of the property subject to the tax. The computation of the tax is a simple matter—the value of the property subject to the tax is multiplied by the tax rate. If there is a question as to either of the elements, there is a question as to the amount of the tax. Here, there is a question as to the value of the property subject to the tax and not as to the tax rate. Thus the tax rate has been applied to a property valuation which petitioner contends is erroneous; petitioner does not now, nor has it ever contended that the calculation is erroneous—that is a matter of simple arithmetic; if the valuation of the property is changed, the amount of the tax will necessarily be changed.

IV.

There Was No Judicial Determination of the Amount of Taxes Due.

The principal contention of the respondents seems to be that the amount of the taxes in question was judicially determined, and therefore, under the rule of *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132, the bankruptcy court has no jurisdiction to make any inquiry into the matter. This contention, however, begs the entire question at issue.

As stated on pages 30 and 31 of petitioner's brief:

> "We concede that where the taxpayer has filed an objection to the assessment and there is a hearing thereon, after which the Board of Equalization, upon the evidence presented, makes a determination as to the amount of the assessment, then there is a quasi-judicial determination. We do not concede, however, that this means that the mere approval by the State Board of Equalization of the assessment constitutes a judicial determination . . ."

The basis of the petitioner's position is fully set forth in its opening brief and no purpose would be served by repeating those points here. It should be noted, however, that all the California cases cited by the respondents fall into two categories. The first category includes those cases where there had been hearings by the Board of Equalization on taxpayers' objections to proposed assessments.[5] Those cases are:

> *People v. Goldtree* (1872), 44 Cal. 323 (referred to on page 19 of respondents' brief);

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[5]See footnote No. 9 on page 30 of petitioner's opening brief.

San Jose Gas Co. v. January (1881), 57 Cal. 614 (referred to on page 21 of respondents' brief);

Oakland v. Southern Pacific Co. (1900), 131 Cal. 226, 63 Pac. 371 (referred to on page 20 of respondents' brief);

Los Angeles etc. Co. v. County of Los Angeles (1912), 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277 (referred to on pages 20 and 21 of respondents' brief);

Eastern Columbia, Inc. v. County of Los Angeles (1943), 61 Cal. App. 2d 734, 70 P. 2d 507 (referred to on page 21 of respondents' brief).

The Supreme Court of the State of California has recognized that the Board of Equalization exercises judicial functions only where there has been a hearing. Thus in *Universal Consolidated Oil Co. v. Byram* (1944), 25 Cal. 2d 353 at 362, 153 P. 2d 746 (referred to on page 37 of petitioner's opening brief and on page 20 of the respondents' brief), the Court states:

> ". . . the respective county board of equalization is the fact-finding body designated by law to remedy excessive assessments (Cal. Const., art. XIII, §9), and when that tribunal, *after due hearing* [emphasis added] and within the limits of reasonable discretion, makes its *findings on the facts,* such decision is final and conclusive."

In our case, there was no hearing—and this leads to the second category of cases relied upon by the respondents. The second category includes those cases holding that a failure to file a timely objection with the Board of Equali-

zation precludes judicial review of the assessment. These cases rest on the doctrine of the failure to exhaust administrative remedies; there is not the slightest hint in these cases that the Board has performed a judicial act where there has been no objection and no hearing.[6] The cases falling into this category are:

Luce v. City of San Diego (1926), 198 Cal. 405, 245 Pac. 196 (referred to on p. 18 of respondents' brief);

Dawson v. County of Los Angeles (1940), 15 Cal. 2d 77, 98 P. 2d 495 (referred to on p. 18 of respondents' brief);

Globe G. & M. Co. v. Los Angeles Co. (1923), 62 Cal. App. 297, 216 Pac. 631 (referred to on p. 21 of respondents' brief).

It is conceded that the administrative remedy was not pursued in the instant case. As pointed out on pages 29 and 30 of petitioner's opening brief, the only time when any objection could have been made to the County Board of Equalization was at the inception of the bankruptcy proceedings, during which there was no adequate opportunity for any officer of the bankruptcy court to make any objection. By the time the tax bill was presented to the debtor, the time to file objections with the County Board had long since elapsed. Thus it was impossible to pursue the administrative remedies.

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[6]See footnote No. 12 on page 33 of petitioner's opening brief.

V.

A "Debtor in Possession" Under a Chapter XI Proceeding Occupies the Position of a Trustee in Bankruptcy.

On pages 14 and 25 of their brief, the respondents argue that this case is distinguishable from the ordinary bankruptcy by reason of the fact that the debtor was in possession. It is apparently the respondents' contention that the debtor's position is exactly the same as if there had been no bankruptcy proceedings. That this is not the law is recognized by the respondents themselves in other portions of their brief. On page 8 of respondents' brief it is stated: ". . . but the Debtor in possession, with the rights and duties of a trustee, failed to appear at the hearing." Again, on page 9 of their brief, respondents state: "Here the debtor in possession, with the powers and duties of a trustee (Bankruptcy Act, Secs. 342, 343; 11 U. S. C. A., Secs. 742, 743). . . ."

The above quoted statements from respondents' brief correctly set forth the law. Section 342 of the Chandler Act (11 U. S. C., Sec. 742) reads as follows:

> "Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this Act, subject, however, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe."

This Court has recognized that a debtor in possession under a reorganization proceeding occupies a different position from the debtor's possession prior to the com-

mencement of the reorganization proceeding. In *Case v. Los Angeles Lumber Products Co., Ltd.* (1939), 308 U. S. 106 at 125, this Court stated:

> "The court acquires 'exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section.' The court need not keep the debtor in possession but may substitute for the old management a trustee; or if the old management is retained it operates the business 'subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as the judge may from time to time impose and prescribe.' Thus, while the property remains in the hands of the court, as it does until dismissal or final decree on confirmation, the debtor, though left in possession by the judge, does not operate it, as it did before the filing of the petition, unfettered and without restraint. The control of the court is then pervasive."

See also:

In re Walker (2nd Cir., 1937), 93 F. 2d 281;

Central Hanover Bank v. President, etc. (2nd Cir., 1939), 105 F. 2d 130;

The City of New York v. Rassner (2nd Cir., 1942), 127 F. 2d 703;

Urban Properties Corp. v. Benson, Inc., Debtor (9th Cir., 1940), 116 F. 2d 321.

In the *Central Hanover* case above, Judge Learned Hand, speaking for the Court, states (105 F. 2d at 131-132):

> "A reorganization trustee, or a 'debtor in possession,' has all the power of an ordinary trustee, §186, 11 U. S. C. A., §586, and of a receiver in equity,

§187, 11 U. S. C. A., §587; and, although strictly, such a receiver has no better title than the defendant whose possession he takes over, this limitation has been very materially extended; there are occasions when he may represent creditors when the defendant would have had no standing. *McCandless v. Furlaud*, 296 U. S. 140, 56 S. Ct. 41, 80 L. Ed. 121; *Pittsburgh Carbon Co. v. McMillin*, 119 N. Y. 46, 23 N. E. 530, 7 L. R. A. 46."

In closing this discussion, we should like to point out that the Court of Appeals for the Ninth Circuit recognizes no distinction between a debtor in possession, a receiver in possession, or a trustee in bankruptcy. The *Benson* case above cited so holds, and the Court uses the following language to demonstrate that a debtor in possession occupies the same position as a trustee in bankruptcy (116 F. 2d at 324):

"The statutory continuance of a debtor in possession subject to the control of the court certainly creates the debtor a 'custodian' of the property under the court's control and hence an 'officer.' *Cf. In re Shapera*, 7th Cir., 86 F. (2d) 506, 507. Where the debtor becomes by the court's order the person authorized to operate the business, he becomes the 'person authorized by law to perform the duties of such officer', as the trustee. . . .

"However, whether or not the debtor is an officer within the provisions of section 1 (22), the authorization to conduct the business under the control of the court is to conduct it not as a free lessee, but as 'agent' for the court in its care of the interest of creditors. *In re Avorn Dress Co.* (D. C., N. Y.),

> 11 F. Supp. 574. Lessee's function as agent may be regarded as 'analogous' to a receiver in equity, *In re Avorn Dress Co.* (2nd Cir.), 78 F. (2d) 681, 683; *In re Schulte Retail Stores* (D. C., S. D., N. Y.), 22 F. Supp. 612, 615, or a combination of an ordinary trustee in bankruptcy and a receiver in equity, *In re James Butler Grocery Co.* (D. C., E. D., N. Y.), 12 F. Supp. 851, 852, or that of conducting the business 'in trust for the benefit of the creditors'. *In re Martin Custom-Made Tires* (2nd Cir.), 108 F. (2d) 172, 173; *In re Morgan* (D. C., N. Y.), 15 F. Supp. 52, 53."

Another case which is of interest because it involves a question similar to that presented by the petition for writ of certiorari in the instant case is *Goggin v. Byram* (9th Cir., 1949), 172 F. 2d 868. In that case the proceedings commenced under Chapter XI and the debtor was placed in possession. Subsequently, a receiver was appointed and shortly thereafter there was an adjudication in bankruptcy. That there was no difference is made clear from the reasoning of the Court which held, as in our case, that the Bankruptcy Court had no jurisdiction to determine the tax question involved, citing the Court's decision in our case as authority. The Court stated (172 F. 2d at 870):

> "The Bankruptcy Court is given no authority to redetermine an assessment, or to divide it arbitrarily, after it has been quasi-judicially determined pursuant to state law. *Arkansas Corporation Commission v. Thompson,* 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244. Assuming the doubtful proposition that the trustee was entitled to any relief, his remedy was by application to the county board of equalization. *Quinn v. Aero Services, Inc.,* 9 Cir., 172 F. 2d 157."

The case of *Goggin v. Byram* is now pending in this Court on a petition for a writ of certiorari. We refer to it not only to show that the Court of Appeals for the Ninth Circuit makes no distinction between a debtor in possession and a trustee in bankruptcy, but also to show the automatic application of the rule of the Ninth Circuit that a Bankruptcy Court has no jurisdiction with respect to any questions involving the amount of any state tax claim.

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari be granted and that this Honorable Court review and reverse the judgment of the Court of Appeals for the Ninth Circuit.

Dated: July 21, 1949.

Respectfully submitted,

MARTIN GENDEL,
Counsel for Petitioner.

MARTIN GENDEL,
GEORGE BOUCHARD and
H. MILES RASKOFF,
Of Counsel.

FILE COPY

Supreme Court, U. S.
FILED
JUN 29 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1949

No. 84

AERO SERVICES, INC., a corporation, debtor,

Petitioner,

vs.

JOHN R. QUINN, County Assessor, and H. L. BYRAM, County Tax Collector, of Los Angeles County,

Respondents.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

HAROLD W. KENNEDY,
County Counsel,
Counsel for Respondents.

ANDREW O. PORTER,
Deputy County Counsel,
Of Counsel.

WESTERN PRINTING COMPANY, WHITTIER

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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1948

No. 821

AERO SERVICES, INC., a corporation, debtor,

Petitioner,

vs.

JOHN R. QUINN, County Assessor, and H. L. BYRAM, County Tax Collector, of Los Angeles County,

Respondents.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now the respondents, John R. Quinn, County Assessor and H. L. Byram, County Tax Collector of Los Angeles County, and file this brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, on the ground that there are no special or important reasons for the exercise of the discretion of this Honorable

Court in granting a review on writ of certiorari and on the ground that the decision of the Court of Appeals is correct.

This case involves a simple interpretation and practical application of the rule laid down in *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244 (and recently explained in *Gardner v. New Jersey* (1947), 329 U. S. 565, 67 S. Ct. 467, 91 L. Ed. 504), to the effect that the bankruptcy court has no jurisdiction to re-determine the assessed valuation of property for county tax purposes, where a valid determination before a quasi-judicial state body has become final. The only difference between that case and this is that in this case the petition under Chapter XI of the Bankruptcy Act (11 U. S. C. A., Secs. 701 et seq.) was filed after the assessment and before the hearing and the Debtor-in-possession with the rights and duties of a trustee failed to appear at the quasi-judicial hearing before the state agency, although it had statutory and published notice and ample opportunity to appear.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 172 Fed. 2d 157 and is also included in the Transcript of Record at page 102. The opinion of the District Court is reported at 75 Fed. Supp. 347 under the name of *In Re Aero Services* and is printed in the Transcript of Record at page 62.

JURISDICTION

Respondents do not claim any defect in the statement of jurisdiction contained in the petition.

QUESTION PRESENTED

The sole question presented is whether the bankruptcy court has jurisdiction to re-determine the assessed valuation of property for county tax purposes after a valid determination by a quasi-judicial state agency has become final according to state law, where the petition in bankruptcy was filed before the date of hearing by the state agency and the trustee or debtor in possession failed to appear at such hearing.

STATEMENT

The facts in the case at bar were undisputed before the referee, and were correctly stated in the opinion of the Court of Appeals, but are erroneously stated by petitioner in his petition and brief in this court.

The first Monday in March is the tax and lien date in California (Calif. Constitution, Article XIII, Sec. 8, Calif. Revenue and Taxation Code, Secs. 405, 2192, 117). On said day the Debtor, petitioner herein, was the owner of the personalty in question and of certain real property in Los Angeles County, on which the personal property tax to be thereafter determined then became a lien. (Calif. Revenue and Taxation

Code, Sec. 2189. T. R., 39). On May 14, 1946, a verified declaration of the property for county tax purposes (as required by the Calif. Constitution, Article XIII, Sec. 8, and by Revenue and Taxation Code, Sec. 441), made on behalf of the Debtor by its auditor, was filed with the County Assessor (T. R., 39). This declaration showed the taxable value of the personal property in question on the first Monday in March, 1946, to be $355,710.00 (T. R., 39). Thereafter, but prior to the first Monday in July, 1946, the County Assessor fixed the value of the personal property in question for county tax purposes at the figure named in the declaration (T. R., 40).

On June 3, 1946, the Debtor, Aero Services, initiated bankruptcy proceedings by filing a petition under Sec. 322 of Chapter XI of the Bankruptcy Act (11 U. S. C. A., Sec. 722. T. R., 2-14) and on the same day the District Court referred the matter to a referee and entered an order permitting Aero Services as a debtor to remain in possession of its assets and carry on its business under the supervision of the court (Bankruptcy Act, Secs. 342, 343; 11 U. S. C. A., Secs. 742, 743. T. R., 39).

On July 1, 1946, the County Board of Equalization commenced its review of all assessments within the county for the purpose of correcting any errors of the County Assessor and for the further purpose of equalizing the assessments (T. R., 40, Calif. Rev. & Tax. Code, Secs. 1603, 1605). The Debtor failed to file an

application for or to appear at the public hearings before this Board to secure a reduction in its personalty assessment (T. R., 40). Accordingly, said assessment at the aforesaid figure became final on or about July 15, 1946. (Calif. Rev. & Tax. Code, Sec. 1614).* Thereafter, a tax bill, based upon the aforesaid assessment, was submitted to the Debtor (T. R., 40).

On November 1, 1946, the county tax upon this personalty became due and on December 5, 1946, it became delinquent (T. R., 40; Calif. Rev. & Tax. Code, Secs. 2605, 2617). The following day, December 6, 1946, the Debtor filed a petition with the Bankruptcy Court for an order directing the County Tax Officers to appear and show cause why the Bankruptcy Court should not redetermine the assessed valuation of the Debtor's personalty for county tax purposes (T. R., 20-22). The order being issued (T. R., 17), the County Tax Officers answered and objected to the jurisdiction of the Bankruptcy Court to make such a redetermination (T. R., 23-35).

The matter was heard before the referee and a stipulation entered into as to the question involved (T. R., 38). The referee found that there was no question or dispute as to the ownership of the personalty in ques-

*Even if it is conceded for the purpose of argument only that the time to appear before the County Board of Equalization was extended by Section 11e of the Bankruptcy Act (11 U. S. C. A., Sec. 29e), it was extended only sixty days subsequent to the date of adjudication, or until August 2, 1946. (Sec. 312 (2), Bankruptcy Act; 11 U. S. C. A., Sec. 712 (2).)

No attempt was made to secure an extension of time for appearance before the County Board of Equalization or to enjoin such hearings. The Debtor did nothing until the following December.

tion; that there were no conflicting liens involved; that there was no error of calculation in determining the tax, but that the sole question was the determination of the value of such property for county tax purposes on the first Monday in March, 1946 (T. R., 41). The referee overruled the objection (T. R., 42-45) and the District Court affirmed the order of the referee (T. R., 61-79 and 91-92 and 75 Fed. Supp. 349).

The County Tax Officers, respondents herein, appealed to the Circuit Court of Appeals for the 9th Circuit (T. R., 80, 93) which reversed the District Court and ordered the proceeding remanded with instruction to dismiss the petition for redetermination in accordance with its opinion (T. R., 101 to 112; 172 Fed. 2d 157). A petition for rehearing was denied March 14, 1949 (T. R., 113). The Debtor, Aero Services, now petitions this Honorable Court for a review by writ of certiorari.

The sole question of law is the jurisdiction of the Bankruptcy Court to redetermine the assessed valuation of the Debtor's personalty for county tax purposes under the circumstances above set forth.

SUMMARY OF THE ARGUMENT

In *Arkansas Corp. Commission v. Thompson* (1941), 313 U. S. 132; 61 S. Ct. 888; 85 L. Ed. 1244, this honorable Court held that the bankruptcy court had no jurisdiction to redetermine the assessed valuation of a railroad which had previously been determined by the Arkansas Corp. Commission, a quasi-judicial body, where the trustee had participated in the hearing but had failed to appeal to the state courts and the decision of the commission had become final. This court distinguished the case of *New Jersey v. Anderson* (1906), 203 U. S. 483, 27 S. Ct. 137, 51 L. Ed. 284, on the ground that the decision there was an administrative and not a quasi-judicial decision, was made arbitrarily without the right to a hearing or to review in the state courts. In *Gardner v. New Jersey* (1947), 329 U. S. 565; 67 S. Ct. 467; 91 L. Ed. 504, this court held that although the bankruptcy court could not redetermine the assessed valuation after a valid determination by a quasi-judicial state agency had become final, certain other questions, such as the priority and extent of liens, the amount of the tax and the compromise or settlement of claims, were within the jurisdiction of the bankruptcy court.

Respondents contend that the decision of the Court of Appeals in the present case is well within the rule of *Arkansas Corp. Commission v. Thompson*, as explained in *Gardner v. New Jersey*. The sole question before the bankruptcy court in this case was the rede-

termination of the assessed valuation of property for county tax purposes. In this case there was a right to a hearing before the County Board of Equalization, a quasi-judicial body, but the Debtor in possession, with the rights and duties of a trustee, failed to appear at the hearing. Respondents maintain that the Debtor cannot avoid the effect of a quasi-judicial determination by failing to appear at the hearing provided by state law. Furthermore, the determination of the county board of equalization became final, notwithstanding the filing of a petition in bankruptcy; and the determination was final before application was made to the bankruptcy court to redetermine the assessed valuation. This being true, there is no special or important reason for granting the writ. The petitioner's specification of error is not well taken and his argument fails to show any error in the decision of the Court of Appeals.

ARGUMENT

I.

THE REASONS ALLEGED FOR GRANTING THE WRIT ARE NOT APPLICABLE

Petitioner alleges that the writ of certiorari should issue because the question involved in this case is of far-reaching importance, the decision of the Court of Appeals is in conflict with decisions of this court and in conflict with decisions of courts of appeal in other Circuits. Respondents maintain that none of these reasons is applicable to this case.

1. This case is not of far-reaching importance

There is but one fundamental factual distinction between the instant case and the case of *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132. In the Arkansas case the trustee in bankruptcy participated in the assessment hearing before the state administrative agency but failed to appeal to the state courts. Here the debtor in possession, with the powers and duties of a trustee (Bankruptcy Act, Secs. 342, 343; 11 U. S. C. A., Secs. 742, 743), ignored the opportunity for a hearing on its assessment before the County Board of Equalization. This factual distinction is, however, without legal consequence. Thus a decision in this case could not be of far-reaching importance in the administration of bankrupt estates and would settle only the question of the application of the

Arkansas case to this particular situation. This question has been decided to the same effect in two other circuits. (*Commonwealth of Pennsylvania v. Aylward* (1946, C. A. 8th), 154 Fed. 2d 714, 717; *In re Ingersoll Co.* (1945, C. A. 10th), 148 Fed. 2d 282, 284; *Baumann v. Sheehan* (1944, C. A. 8th), 140 Fed. 2d 747, 751.

2. The Decision here is not in conflict with decisions of the Supreme Court

The decision in the instant case is not in conflict with the decisions of this Honorable Court. It is merely a simple practical application of the rule of *Arkansas Corp. Commission v. Thompson* (1941), 313 U. S. 132. It is within the holding of *Gardner v. New Jersey* (1947), 329 U. S. 565.

The case of *New Jersey v. Anderson* (1906), 203 U. S. 483, is not applicable because in that case the decision was strictly an administrative decision arbitrarily made without the right to a hearing or to review in the state courts and showed on its face that it was probably in excess of the jurisdiction of the state agency. It was therefore distinguished by this Court in *Arkansas Corp. Comm. v. Thompson,* 313 U. S. 132 at 143 and 144. There is no similarity between the Anderson case and the present case. Petitioner does not question the fact that the County Board of Equalization is a quasi-judicial body under California law. The Court of Appeals so held (T. R., 110, 111; 172 Fed. 2d 157, 161), in accordance with California law (see cases cited in opinion).

3. The Decision in this case is not in conflict with that in other circuits

A careful reading of the decisions cited by petitioner shows that there is in reality no conflict between the decisions in the various circuits on the question presented here.

In re Monongahela Rye Liquors (1944, C. A., 3d), 141 Fed. 2d 864, the assessment was arbitrarily made and the taxpayer had no right to a hearing or to appeal (see 141 Fed. 2d at 868). The court therefore held that the rule of the Anderson case was applicable instead of that of the Arkansas case, and said (141 Fed. 2d at 868):

> "The question in any instance, therefore, is whether the circumstances necessary to justify an exercise of bankruptcy's power to redetermine a tax claim are present. We think they are in the instant case. The taxpayer having failed to file a return, the tax assessments against it were based upon estimated 'settlements' arbitrarily made by the State's Department of Revenue without hearing the taxpayer. . . . From any estimated settlement no right to review or appeal is allowed. . . .
>
> "For the most part, the tax claims in the instant case are based upon such estimated settlements. We think it is plain that the referee's hearing and determination of the amount of tax actually due did not involve a second trial of a controverted fact, such as the exercise of the power entailed in the Thompson case. We are, therefore,

> of the opinion that, under the circumstances here shown, the rule of the Anderson case is applicable and that the referee's redetermination of the Commonwealth's tax claims was a justifiable exercise of bankruptcy's power."

In *Lyford v. New York* (1943, C. A., 2d), 137 Fed. 2d 782, the bankruptcy court had ordered the trustee to appear before the city taxing authorities, who held a hearing on November 12, 1936, but had reached no decision when the trustee on December 1, 1942, requested the bankruptcy court to determine the question. It is thus obvious that there was not and could not have been any final decision by a quasi-judicial state agency which would prevent the bankruptcy court from itself determining the assessed valuation. The court states (in 137 Fed. 2d at pages 786-787):

> "Here there had been no final or conclusive action by the comptroller. Indeed, the very reason for the proceeding is the inaction of the state-taxing authority. The only definite step so far taken has been merely a preliminary one, namely, the ex parte determination of the comptroller, which does not differ from the action of the New Jersey assessors in the Anderson case. Moreover, the questions here involved are questions of law."

No other cases are cited by petitioner as opposed to the decision of the Court of Appeals in this matter and we know of none.

II.

PETITIONER'S SPECIFICATION OF ERRORS IS NOT SUFFICIENT

Petitioner specified four errors, none of which is well taken.

1. Determination of the amount of the tax is not in controversy

Petitioner's first specification is that the Court of Appeals erred in holding that the bankruptcy court had no jurisdiction to determine the *amount* of taxes due. This specification is not in point and has no bearing in this case because the Court of Appeals did not so hold, the question not being before the court since the debtor stipulated and the referee found (T. R., 41) that there was no error of calculation in determining the tax claimed to be due by the County of Los Angeles and that the sole question was the determination of the value of the property for county tax purposes on the first Monday in March, 1946. This court specifically held in *Gardner v. New Jersey* (1946), 329 U. S. 565 at 580, that the bankruptcy court may determine the amount of a tax claimed, but may not redetermine the values underlying the assessments.

2. The Decision of the Board of Equalization became final notwithstanding the commencement of bankruptcy proceedings.

Petitioner's second error specified is in holding that the action of the County Board of Equalization, *subsequent* to the commencement of the bankruptcy proceeding, afforded a proper basis for a plea of *res judicata*. This question was settled in *Arkansas Corp. Commission v. Thompson* (1941), 313 U. S. 132, where the entire tax proceeding had taken place subsequent to bankruptcy. (See also: *Baumann v. Sheehan* (1944, C. A., 8th) 140 F. (2d) 747; *Kelly v. U. S.* (1937, C. A., 9th) 90 F. (2d) 73).

3. The Debtor here had ample opportunity to participate in the hearings

Petitioner's third specification of error is in holding that the rule of *Arkansas Corporation Commission v. Thompson* applied where the tax accrued prior to bankruptcy and no officer of the bankruptcy court participated in or had an opportunity to participate in any hearings before the state board. The factual basis for this specification is entirely erroneous since the Debtor was in possession at all time and had ample opportunity to appear before the County Board of Equalization but failed to do so (T. R., 39-41).

4. The case of New Jersey v. Anderson does not apply

The next specification is the failure to apply the rule of *New Jersey v. Anderson* (1906), 203 U. S. 483.

This case has no application to a factual situation such as this and this honorable court so held in *Arkansas Corp. Commission v. Thompson* (1941), 313 U. S. 132.

III.

PETITIONER'S ARGUMENT FAILS TO SHOW ANY ERROR IN THE DECISION OF THE COURT OF APPEALS.

Petitioner groups his argument under four headings: First, that the Bankruptcy Act confers jurisdiction to determine the amount of taxes due. Second, that there had been no hearing and therefore no basis for a plea of *res judicata* in this case. Third, the bankruptcy court, may, in its discretion refer the question of assessed valuation to the proper state tribunal. And fourth, that if the bankruptcy court is without jurisdiction in the present case, the fraud or other wrongful act of the bankrupt would be beyond the reach of the bankruptcy court. It is submitted that none of these four points is applicable to the facts of the present case.

1. The issue before the bankruptcy court here was not the amount of the tax but the redetermination of the assessed valuation.

It may be conceded that the Bankruptcy Act (Sec. 64a(4), 11 U. S. C. A. 104a(4) confers power on the court to determine the *amount* of taxes due. This court has so held in *Gardner v. New Jersey* (1947), 329 U. S.

565. However, this question is not involved in this case because it was stipulated and the referee found that there was no error of calculation in determining the tax claimed to be due by the County of Los Angeles (T. R., 41) and that the sole question before the court was the determination of the value of the property for county tax purposes (T. R., 41). In *Gardner v. New Jersey,* 329 U. S. 565 at 578-579, this court said:

> "We held in *Arkansas Corp. Commission v. Thompson,* 313 U. S. 132, 85 L. ed. 1244, 61 S. Ct. 888, 45 Am. Bankr. Rep. (N. S.) 462, supra, that the reorganization court lacked the power under Sec. 77 to redetermine for state tax purposes the property value of a railroad where that value had already been determined in state proceedings which afforded ample protection to the railroad's rights. We adhere to that decision. Its ruling precludes redetermination by the reorganization court in this case of the valuations underlying the assessments made by the state authorities and the validity of those assessments used as the basis for the computation of the taxes. It may not therefore entertain the objections to New Jersey's claim which tender those issues. The proper tribunals where those issues may be litigated, if they are still open for any year, are the state agencies and courts and, under special circumstances, the federal courts."

This court then summarized its holding (329 U. S. at 584):

> "We only hold that the reorganization court could properly entertain all objections to the claim

except those involving the valuations underlying the assessments and the validity of those assessments.

"On the present record we do not know all the issues that were involved in the prolonged litigation concerning the taxes for the years in question. Hence, what we have said is subject to the limitation that *res judicata* may have made binding on the reorganization court various questions of local law, including the amount and validity of the taxes under New Jersey law and the character and extent of the lien which that law affords them."

The decision of the Court of Appeals in the instant case that the bankruptcy court may not redetermine the assessed valuation after the decision of a local quasi-judicial body has become final is therefore correct.

2. Petitioner cannot avoid the effect of a quasi-judicial determination by simply failing to appear at the time and place set for the hearing.

Petitioner argues that there had been no hearing and, therefore, there is no basis for a plea of *res judicata*. Even assuming that the rule applied here is solely one of *res judicata* (which respondents do not concede), the premise is not correct. The assessment was made by the County Assessor, the assessment roll delivered to the clerk of the Board of Supervisors who published notice according to law (Calif. Revenue and Taxation Code, sec. 1601). The Board of Supervisors sat as a Board of Equalization during the time pre-

scribed by law (Calif. Revenue and Taxation Code, Sec. 1603) but the debtor failed to appear at the hearings (T. R., 40).

The determination of the assessor thereby became the determination of the Board of Equalization and such determination became final, notwithstanding the non-appearance of the taxpayer, and may not be questioned in any state court.

Dawson v. County of Los Angeles (1940), 15 Cal. 2d 77 at 81; 98 Pac. 2d 495;

Luce v. City of San Diego (1926, 198 Cal. 405; 245 Pac. 196;

(*Compare Mahoney v. San Diego* (1926), 198 Cal. 388; 245 Pac. 189, which involved the same assessment and recovery was allowed where appearance had been made before the Board of Equalization);

3 Cooley, Taxation (4th ed., 1924) sec. 1143, p. 2296.

The situation is comparable to a judgment by default which is a proper basis for a plea of *res judicata* and estoppel.

In re Guardianship of Jacobson (1947), 30 Cal. 2d 326, 334, 182 P. 2d 545;

Fitzgerald v. Herzer (1947), 78 Cal. App. 2d 127, 131-132, 177 P. 2d 364;

Restatement, Judgments, sec. 68, pp. 294, 302; Note 128 A. L. R. 472, 474.

Petitioner apparently concedes that California law provides a valid quasi-judicial remedy through a hearing before the County Board of Equalization with right to subsequent appeal to the California courts. The California assessment procedure requires the County Board of Equalization to give notice of its session and to hold hearings upon every verified written application for reduction in assessment duly presented to it. These hearings must include examination of the applicants under oath concerning the value of their property, and the Board may subpoena witnesses and take evidence as necessary, including that of the Assessor and his staff, who must be present as needed (Calif. Revenue & Taxation Code, Secs. 1601-1615). Clearly this procedure for the review of the correctness of the assessments made by the County Assessor and for their equalization constitutes a valid and constitutional quasi judicial determination. (*Hagar v. Reclamation Dist. No. 108* (1884), 111 U. S. 701, 710, 4 S. Ct. 663, 28 L. Ed. 569). The California cases so hold without exception.

In the early case of *People v. Goldtree* (1872), 44 Cal. 323, the California Supreme Court said at pages 325-326:

> " . . . The Board of Equalization, in passing on the question whether an assessment is too high or too low, *acts in a judicial capacity,* and its decision is an adjudication, and as clearly so as a judgment for the recovery of a tax. . . . " (Italics ours.)

In *Oakland v. Southern Pacific Co.* (1900), 131 Cal. 226, 230, 63 Pac. 371, the settled rule in California was declared to be that the Board could act *only upon evidence* in raising or lowering an assessment.

In *Los Angeles Etc. Co. v. County of L. A.* (1912), 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277, the court spoke as follows at page 169 with respect to the function of the County Board of Equalization:

> " . . . . Upon such hearing it is the duty of such board to determine the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property, so as to make all the assessments as equal and fair as is practicable. In discharging these duties *the board is exercising judicial functions,* and its decision as to the value of the property and the fairness of the assessment *so far as amount is concerned* constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question which abrogates and takes the place of the judgment of the assessor upon that question. . . . " (Italics ours.)

The challenged assessment became final and conclusive upon termination of the County Board of Equalization's Proceedings. The latest case in California enunciating this thoroughly established principle is *Universal Cons. Oil Co. v. Byram* (1944), 25 Cal. 2d 353, 153 P. (2d) 746. There the court stated at page 362:

" . . . As appears from the numerous authorities cited in the forepart of this opinion, the respective county board of equalization is the fact-finding body designated by law to remedy excessive assessments (Cal. Const., art. XIII, Sec. 9), and when that tribunal, after due hearing and within the limits of reasonable discretion, makes its *findings on the facts,* such decision is final and conclusive. . . . " (Italics theirs.)

Like statements of this basic principle may also be found in:

Eastern Columbia, Inc. v. County of Los Angeles (1943), 61 Cal. App. 2d 734, 744-745, 70 P. (2d) 507;

Hammond L. Co. v. County of Los Angeles (1930), 104 Cal. App. 235, 241, 285 Pac. 896;

Globe G. & M. Co. v. Los Angeles Co. (1923), 62 Cal. App. 297, 299, 216 Pac. 631;

San Jose Gas Co. v. January (1881), 57 Cal. 614, 616.

To quote again from *Los Angeles Etc. Co. v. County of L. A., supra,* 162 Cal. 164 at page 168 (121 Pac. 384):

" . . . The law necessarily leaves the determination of the question of fact of value to certain officers, and when it appoints tribunals for that purpose, as in this state primarily the assessor, and, for purpose of review, the board of supervisors acting as a county board of equalization, the conclusion of those tribunals on such a ques-

tion of fact constitutes a judgment that is not collaterally assailable in the courts. This is the universal rule, and it has been so held in this state. (Citing authority.) . . . "

This finality is not affected by the failure of the taxpayer to avail himself of his right to review by the County Board of Equalization. Failure of the bankrupt to take advantage of the remedy provided by California law for the quasi-judicial review of the challenged assessment could not invest the Bankruptcy Court with power under sec. 64a(4) to revise the assessment. This question had previously been settled in two circuits.

Commonwealth of Pennsylvania v. Aylward (1946, C. A., 8th), 154 F. 2d 714, 717;

In re Ingersoll Co. (1945, C. A., 10th), 148 F. 2d 282, 284;

Baumann v. Sheehan (1944, C. A., 8th), 140 F. 2d 747.

The debtor in possession had statutory notice and also notice by publication of the conduct of the hearings. It was his duty to know and he is charged with knowledge of the tax procedure and administrative remedies available. Failing to take such action he was guilty of laches.

Bowman v. Sheehan (1944, C. A., 8th), 140 Fed. 2d 747.

Whether this rule be stated as one of *res judicata,* estoppel, laches, failure to exhaust administrative rem-

edies or jurisdiction, the result is the same: the Bankruptcy Court had no power to proceed to redetermine the assessed valuation in the instant case, after the determination had become final under state law by reason of the failure of the debtor to appear before the Board of Equalization during the time allowed by law. The decision of the Court of Appeals is therefore correct.

3. Petitioner's argument that the Bankruptcy Court may refer the question to the state tribunal is not in point.

Petitioner argues that the bankruptcy court may, at its discretion, refer the question of assessed valuation to the state tribunal for determination. This was the procedure followed in *Lyford v. City of New York* (1943), 137 Fed. 2d 782. However, the argument has no place in the instant case because the bankruptcy court never attempted to refer the question to the County Board of Equalization. It took no action whatsoever until after the decision of the County Board of Equalization had become final under state law and until after any possible extension under the Bankruptcy Act had expired. It then attempted itself to redetermine the assessed valuation. *Universal Consolidated Oil Co. v. Byram* (1944), 25 Cal. 2d 353, 153 Pac. 2d 746, is not in conflict. The Supreme Court of California there remanded the case for further hearing before the Board of Equalization. However, the case had previously been before that Board and appli-

cation to the Board of Equalization had been made within the time allowed by state law. Nothing in either state or federal law authorizes any court to order a hearing or rehearing before the County Board of Equalization, after its decision has once become final. Its decision was final in this case before application was made to the referee. There was no question then to refer. Whether or not a power exists must be determined as of the time of its exercise.

4. Petitioner's argument about fraud has no application to this case

Petitioner argues that if the bankruptcy court is without jurisdiction in this case then fraudulent acts of the debtor or bankrupt would be beyond the reach of the bankruptcy court. This is a non-sequiter and not applicable here. No suspicion of fraud was shown in the hearing before the referee (T. R., 39 to 41). Thus, the question has no bearing in this case. If this were a case of fraud the usual principles of equity would apply, allowing a court of equity to set aside the judgment of the County Board of Equalization for extrinsic fraud, the same as any other judgment, where the application is not barred by laches. However, respondents doubt if the debtor itself could take advantage of its own fraud to secure such action. The Bankruptcy Act (sec. 326; 11 U. S. C. A., sec. 726) provides the proper remedy of the creditors, in case of fraud or neglect of a Debtor in possession under Chapter XI, that is, to have the Debtor bonded at the com-

mencement of proceedings and proceed against the surety on his bond if any loss occurs. This case is not one of an innocent trustee unfamiliar with the Debtor's property, appointed after the assessment and only a few days before the meeting of the County Board of Equalization. Here the debtor itself has been in continuous possession of its property with statutory and published notice of the assessment procedure, and it failed to take the steps that were available to it for the correction of any claimed errors in the assessment.

CONCLUSION

Respondents respectfully submit that there are no special or important reasons for granting the writ; that no errors have been shown in the decision of the Court of Appeals and that the decision of the Court of Appeals is correct and should be affirmed.

Respondents argue that this case is not of far-reaching importance because it is a simple application of the rule of *Arkansas Corp. Commission v. Thompson.* The decision here follows and correctly applies the decisions of this court. Petitioner's specification of errors is not sufficient because the determination of the amount of the tax is not in controversy, the decision of the Board of Equalization became final notwithstanding the commencement of bankruptcy proceedings, the Debtor had ample opportunity to participate in the hearings and the case of *New Jersey v.*

Anderson does not apply. Petitioner's argument fails to show any error in the decision of the Court of Appeals because the sole question before the bankruptcy court was the redetermination of the assessed valuation, petitioner cannot avoid the effect of a quasi-judicial determination by simply failing to appear at the time and place set for the hearing, Petitioner's argument that the bankruptcy court may refer the question to a state tribunal is not in point and no fraud is involved in this case. The decision of the Court of Appeals is therefore correct.

WHEREFORE, respondents respectfully submit that the Petition for Writ of Certiorari should be denied and that the judgment of the Court of Appeals for the 9th Circuit should be affirmed.

Dated: June 24, 1949.

Respectfully submitted,

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